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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 644.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, AND JOHN W. MOTLEY, PLAINTIFFS IN ERROR,

vs.

W. H. MINER AND CHARLES WORDEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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1-3 *Stipulation for Reduction of Transcript.*

In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents (Plaintiffs in Error),

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants (Defendants in Error).

It is hereby stipulated by and between the parties to the above entitled suit, through their respective attorneys, to-wit, John M. Gearin and Harry G. Hoy, on behalf of the plaintiffs, and Guy C. H. Corliss, on behalf of the defendants, that the Clerk of the above entitled court, in preparing the record to be transmitted to the Supreme Court of the United States, on the Writ of Error heretofore issued, shall include in said transcript the following mentioned papers and copies, and no others, to-wit:

1. Copy of plaintiffs' amended complaint.
2. Copy of defendants' amended answer.
3. Copy of plaintiffs' reply.
4. Copy of plaintiffs' exhibit "D. O.", being the order for citation in the matter of the Estate of C. W. Fletcher, deceased.
5. Copy of plaintiffs' exhibit "D. P.", being the citation in the matter of the Estate of Charles W. Fletcher, deceased.
6. Copy of plaintiffs' exhibit "D. Q.", being the printer's affidavit of publication of the citation in said estate.
7. Copy of the Findings of Fact and Conclusions of Law made by the Circuit Court of the State of Oregon for Coos County.
8. Copy of the Decree made and entered by the Circuit Court of the State of Oregon for Coos County, pursuant to said Find-
4 ings of Fact and Conclusions of Law.
9. The several papers and documents filed in the above entitled court in the matter of the prosecution of the Writ of Error, by which it is sought to have the decision in the above entitled court reviewed by the Supreme Court of the United States, and particularly including the Petition for Writ of Error with the order of allowance endorsed thereon, Assignment of Errors, Bond, Writ of Error, and Citation.
10. It is also understood and agreed that a copy of this stipulation shall be incorporated with and made a part of said transcript; and if, in the transcript, anything material to either party be omitted by accident or error, whether the same shall or shall not have been included in this Stipulation, the Supreme Court of the United States may, at the suggestion or instance of either party to the suit, or upon its own motion, direct that the omission be corrected by a supple-

mental transcript, it being the purpose of this Stipulation to reduce the size of the Transcript of Record without prejudicing the rights of either party to the suit.

11. This stipulation is made and entered into pursuant to the terms and provisions of Rule numbered 8 of the Rules of the Supreme Court of the United States, promulgated December 22, 1911, with Amendments of February 26, April 1, and June 10, 1912, and March 20 and June 12, 1916; and it is understood by the parties hereto that the Clerk of the Supreme Court of the State of Oregon shall read this stipulation and be governed thereby only in connection with the terms and provisions of said Rule numbered 8 of the Rules of the Supreme Court of the United States, and particularly that he shall annex to and transmit with the Record, a copy of the opinions filed in the case.

Entered into and dated this 5th day of July, 1917.

5 JOHN M. GEARIN,
HARRY G. HOY,
Attorneys for Plaintiffs and Respondents (Plaintiffs in Error).
GUY C. H. CORLISS,
Attorney for Defendants and Appellants (Defendants in Error).

6 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman et al., Respondents, Plaintiffs, vs. W. H. Miner et al., Appellants, Defendants. Stipulation. Filed July 7, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. John M. Gearin and Harry G. Hoy, Marshfield, Oregon, Attorney- for Plaintiffs in Error.

7 In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants.

Appeal from Decree of Circuit Court for Coos County, Oregon.

Hon. John S. Coke, Judge.

Appellants' Abstract of Record.

On the 9th day of April, 1913, the plaintiffs filed in the Circuit Court for Coos County an amended complaint stating their cause of action against the defendants as follows:

Come now the plaintiffs and for their amended complaint
8 against the defendants in the above entitled suit allege as follows:

1. That the plaintiffs, Minnie Evvia Stadelman and Henry Hines Fletcher, are the daughter and son respectively of Charles W. Fletcher, deceased, and are the sole and exclusive heirs at law of the said Charles W. Fletcher, or C. W. Fletcher, deceased, and are the only persons who were ever entitled to participate in the proceeds of and from the estate of said Charles W. Fletcher, deceased, other than Lucinda Fletcher, widow of said Charles W. Fletcher, deceased, who has since died, leaving no heirs other than the said Minnie Evvia Stadelman and Henry Hines Fletcher.

2. That said Charles W. Fletcher died intestate in Coos County Oregon, on or about the 27th day of January, 1897; and at the time of his said death he was the owner in fee simple of the following mentioned and described real property, to-wit:

The N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26 S. of R. 11, W. of the Willamette Meridian, in Coos County, Oregon.

9 3. That the said plaintiffs, Minnie Evvia Stadelman and Henry Himes Fletcher, prior to the commencement of this suit, have transferred by good and sufficient conveyance to the said plaintiff, John W. Motley, an undivided one-half interest of, in and to the said above described real property, and that they, the said heirs of said Charles W. Fletcher, are still the owners each of an undivided one-fourth interest in and to the same.

4. That said real property is unoccupied and is not in the actual possession of any person other than these plaintiffs.

5. That subsequent to the death of said Charles W. Fletcher, deceased, proceedings were had, or attempted, for the administration of his estate.

6. That the said Charles W. Fletcher at the time of his death was the owner of the following mentioned and described personal property, to-wit:

Four head of young cattle, appraised at Forty dollars ($40.00).

One old horse, appraised at Ten dollars ($10.00).

Twenty-one pieces of county script, appraised at
10 $395.82.

Three pieces of county script, appraised at $43.60.

One promissory note of which one D. L. Rood was maker, appraised at $16.46.

One promissory note of which A. M. Crawford was maker, appraised at $244.72.

That the same was appraised at the foregoing values under date of April 30, 1897, by the appraisers appointed by the County Court of the State of Oregon for Coos County, appraising the property belonging to the estate of Charles W. Fletcher, deceased.

That the total claims filed and allowed against the estate of said Charles W. Fletcher, deceased, amounted to $446.32, and that the legitimate expenses of administration of said estate did not exceed in the aggregate the sum of Three Hundred dollars ($300.00).

7. That in the course of the said administration of said estate of Charles W. Fletcher, deceased, the administrator of said estate sought

to sell at administrator's sale the above mentioned and described real property, but which said attempted sale and the administrator's deed based thereon was and is void, for the following mentioned reasons, among others, to-wit:

a. The said sale was absolutely fraudulent and void by reason of the fact that it appears upon the face of said proceedings, as indicated by the allegations in paragraph, or subdivision 6 of this amended complaint, that said sale was not necessary in order to provide for payment of the claims against said estate, and that it is apparent from the record of said proceedings as indicated by the allegations of said paragraph 6 that the same could not have been made in good faith for that purpose.

b. The petition for the order of sale of said real property failed to state the amount of sales of the personal property belonging to said estate; and did not state the condition or probable value of the different lots or parcels of real property belonging to said estate.

c. That it appears upon the face of said proceedings that the citation to the heirs of said deceased was insufficient in that no term of court is mentioned therein, and for the further reason that the persons to whom said citation was directed were cited to appear on July 16, 1902, whereas the citation bears date June 9, 1902, which would not allow sufficient time for the service of said citation by publication as required by the order.

d. That service of said citation upon the heirs at law of said Charles W. Fletcher, deceased, was ordered made by publication, the order requiring that the same be published four weeks successively requiring the said heirs at law to appear on the 16th day of July, 1902, and show cause, if any, why the order for sale of said real property should not be made; and that said citation was published in the Coos Bay News in accordance with said order, the first publication thereof being made on the 17th day of June, 1902, and the last on the 15th day of July of said year; and that the order for the sale of said property was made on the 17th day of July, 1902.

8. That based upon said void proceedings, the administrator of said estate made to one August Nelson a deed purporting to be an administrator's deed, and purporting to convey to the said August Nelson the above mentioned and described real property, and which said deed was recorded under date of March 3, 1903, in Volume 38, Records of Deeds for Coos County, Oregon, at page 223 thereof, and still remains so of record in the office of the County Clerk of said Coos County.

9. That thereafter, and to-wit, under date of November 18, 1905, the said grantee in said alleged administrator's deed made, executed and delivered to one Nels P. Nelson a deed to said real property, and which said deed was recorded under date of December 26, 1906, in Volume 44 of the Records of Deeds for Coos County, Oregon, at page 567 thereof, and still remains so of record in the office of the County Clerk of said Coos County. That thereafter, and to-wit, under date of November 7, 1906, the said Nels P. Nelson executed and delivered to one Dennis McCarthy a deed purporting to convey to said Dennis McCarthy the above mentioned and described real property,

and which said deed under date of December 26, 1906, was recorded in Volume 44 of the Records of Deeds for Coos County, Ore-
14 gon, at page 575 of said volume, and still remains so of record in the office of the County Clerk of said Coos County. That thereafter, and to-wit, under date of January 5, 1907, the said Dennis McCarthy executed and delivered to William Hutchinson a deed purporting to convey to the said grantee an undivided one-half of said real property, and which said deed under date of January 7, 1907, was recorded in Volume 45 of the Records of Deeds for Coos County, Oregon, at page 290 of said volume, and still remains so of record in the office of the County Clerk of said Coos County. That thereafter, and to-wit, under date of July 15, 1907, the said William Hutchinson and Ella Hutchinson, his wife, together with the said Dennis McCarthy executed and delivered to W. H. Miner, one of the defendants above named, a deed purporting to convey to the said W. H. Miner the above mentioned and described real property, and which said deed was recorded under date of July 23, 1907, in Volume 48 of the Records of Deeds for Coos County, Oregon, at page 10 of said volume, and which said deed still remains so of record in the office of the County Clerk of said Coos County. That there-
15 after, and to-wit, under date of August 10, 1907, the said W. H. Miner and Hattie Miner, his wife, executed and delivered to Charles Worden, one of the defendants above named, a deed purporting to convey to the said Charles Worden an undivided one-half of the above mentioned and described real property, and which said deed, under date of November 30, 1907, was recorded in Volume 48 of the Records of Deeds for Coos County, Oregon, at page 440 of said volume, and still remains so of record in the office of the County Clerk of said Coos County.

10. That each and all of the said records of deeds are regular in form, and together with the said proceedings for the administration of the said estate of Charles W. Fletcher, deceased, on their face purport to vest the title to said real property in the defendants in this suit and make and constitute a cloud upon the plaintiff's otherwise good and perfect title to said above mentioned and described real property.

11. That plaintiffs have no plain, adequate and complete remedy at law.

As a second and separate cause of suit against the above
16 named defendants, the plaintiffs herein allege as follows:

1. Reallege and reaffirm paragraphs, or subdivisions 1, 2, 3 and 4 of the first cause of suit in this amended complaint set forth.

2. That under date of January 31, 1903, one Maggie Young, claiming and asserting some right, title or interest in or to the above mentioned and described real property, did, together with one David Young, her husband, make, execute and deliver to one August Nelson a deed purporting to bargain, sell and quit-claim to one August Nelson, for a valuable consideration, the above mentioned and described real property, and which said deed, under date of March

3, 1903, was recorded in Volume 38 of the Records of Deeds for Coos County, Oregon, at page 224 of said volume, and still remains so of record in the office of the County Clerk of said Coos County.

3. That afterwards, and to-wit, by mesne conveyances, as in paragraph or subdivision 9, of the first cause of suit in this amended complaint contained, the above named defendants have succeeded to the alleged claims or interest of the said Maggie Young and her said husband, David Young.

17 4. That neither the said Maggie Young, nor the said David Young, her husband, ever had any right, title or interest whatsoever in or to the above mentioned and described real property or any part thereof; but that the said deed from the said Maggie Young and David Young, her husband, to the said August Nelson, together with the mesne conveyances therefrom culminating in the conveyances to the above named defendants, each and all of which are regular in form, make and constitute a cloud upon the title of plaintiffs in and to the above mentioned and described real property.

5. That the said August Nelson, grantee in the said deed from Maggie Young and husband, is the same person named as grantee in the alleged administrator's deed mentioned and referred to in plaintiffs' first cause of suit in this amended complaint.

6. That plaintiffs have no plain, adequate and complete remedy at law.

Wherefore, plaintiffs pray the court for judgment and decree thereof as follows:

1. That the clouds existing upon plaintiffs' title to the real
18 property in the foregoing amended complaint mentioned and described be removed and the title of plaintiffs in and to said real property be declared free therefrom.

2. That the defendants and all persons claiming by, through or under them or either of them be forever restrained and enjoined from claiming any right, title or interest adverse to these plaintiffs or either of them in and to the said real property by reason or by virtue of the said administration of the estate of Charles W. Fletcher, deceased, and the said attempted administrator's sale of said real property or any of the mesne conveyances made and based upon said void administrator's sale or by virtue of the said deed from Maggie Young and husband, or any of the mesne conveyances based upon said deed.

3. That plaintiffs be declared to be the owners in fee simple as tenants in common of the said above described real property, the said plaintiff, Minnie Evvia Stadelman, being the owner of an undivided one-fourth thereof, the said plaintiff, Henry Hines Fletcher, the owner of an undivided one-fourth thereof, and the said plaintiff, John W. Motley, the owner of an undivided one-half thereof.

19 4. That plaintiffs have judgment against the defendants jointly and severally for their costs and disbursements in this suit.

5. For such other and further relief as to the court shall seem meet and equitable.

HARRY G. HOY,
Attorney for Plaintiffs.

On the 31st day of January, 1914, the defendants filed an amended answer to the said Amended Complaint as follows:

Now come the defendants above named, and for Amended Answer to the Amended Complaint of plaintiffs:

1. Deny each and every allegation of the following paragraphs appearing in plaintiffs' first alleged cause of suit: 1, 3, 4, 5, 6, 7, 8 and 11, except as hereinafter expressly admitted or qualified; and defendants allege that the facts are as hereinafter stated and not otherwise; and deny that the records, proceedings and deeds referred to in paragraph 10 of said complaint, or any thereof, make or constitute a cloud upon plaintiffs' alleged title or anyone's title, and deny that plaintiffs have any good or perfect title to the
20 real property involved in this suit.

2. The defendants admit the allegations of paragraph 6 of the first cause of suit, except that they deny that the total claims filed and allowed against the said estate were only $446.22; and deny that the legitimate expenses of the administration of said estate did not exceed the sum of $300.00, but allege that the matters in regard thereto are as hereinafter stated and not otherwise.

3. Defendants admit that certain proceedings were had for the sale of real property in said complaint described, and allege that the facts in regard thereto are as hereinafter stated, and deny that such sale proceedings are void or invalid for any reason.

For answer to the second alleged cause of suit in said Amended Complaint stated, these defendants:

Deny each and every allegation of paragraphs or subdivisions 1, 2, 3 and 4 of first cause of suit realleged in paragraph 1 of said second cause of suit.

Deny each and all of the allegations of paragraphs 4 and 6 of said second cause of suit.

21 And for further answer to the Amended Complaint of plaintiff- and by way of separate answer to each and both alleged causes of suit therein set forth, these defendants allege:

1. That one Charles W. Fletcher died intestate in Coos County, Oregon, on or about January 27, 1897, and at the time of his death he was an inhabitant and resident of said county and state, and left assets therein consisting of real and personal property, including the real property in complaint described. And that the only heir at law so far as known is his widow, Maggie Fletcher, now Mrs. Maggie Young.

2. That thereafter on March 6, 1897, there was filed in the County Court of the State of Oregon, for the County of Coos, in the matter of the Estate of Charles W. Fletcher, deceased, a duly verified petition, praying that John F. Hall be appointed administrator of the Estate of said Charles W. Fletcher, deceased, signed by Maggie Fletcher, the widow of the deceased, and John F. Hall. And on March 12,

1897, said County Court duly made an order appointing John F. Hall administrator of said estate and thereafter said John F.
22 Hall qualified as such administrator, and gave the bond by law and said order required; and thereafter on April 14, 1897, letters of administration of said estate duly issued out of said County Court to said John F. Hall, authorizing him to administer said estate according to law, which letters were never revoked, and said John F. Hall continued to act as such administrator up to and including the closing of the administration of said estate in accordance with the order of said County Court made May 20, 1904. That thereafter said administrator gave due and legal notice of his appointment as such and notified all creditors to present their claims to him within six months from the date of the published notice, to-wit, from April 21, 1897; and also caused to be made and filed an inventory and appraisement as by law required.

3. That on the 14th day of January, 1898, said administrator did file in said County Court a duly verified petition for an order setting apart as the property of the widow of said deceased, the livestock in the inventory and appraisement and in said complaint mentioned, and also for an allowance of one-half the rents of the real property. That said petition was in manner and form by law prescribed.
23 That on the same day said County Court duly made an order setting apart said personal property for the widow and making the allowance of one-half the rents as prayed for. That said order was never revoked.

4. That thereafter on June 6, 1902, said administrator caused to be filed in said court and matter a petition for the sale of real property belonging to said estate, which petition set forth, among other things, that all the personal property of said estate had been disposed of by order of said County Court, and in effect that the proceeds of the personal property had been exhausted, and did show the amounts received therefrom; and the charges, expenses and claims unsatisfied, substantially as follows, to-wit:

"That there is a street assessment now levied by the City of Marshfield against said property belonging to said estate amounting to the sum of	$66.67	
That there remains unpaid taxes amounting to	232.69	
24		
That the following claims against said estate remain unpaid:		
Robert Templeton, with interest from May 25, 1897	42.70	
Chas. Barry, now held by Helene Erickson, with interest from June 3, 1897	23.18	
Costs of administration as follows:		
Appraiser's fees	6.60	
Administrator's fees	209.10	
Extraordinary fees	50.00	
Citation to heirs	25.00	
Notice of final settlement	10.00	
Incidental fees, estimated at	15.00	
	$740.94	—$740.94
That there is now on hand the sum of		$228.75
That there is a deficiency in the sum of		$512.19"

25 That the unpaid claims shown in said petition for sale of real property of Robert Templeton for $42.70, and Charles Barry for $23.18, were debts incurred by the deceased in his lifetime.

That at the time of the making and filing of said petition for the sale of real property, and at the time of the making of the order of sale hereinafter mentioned, claims, expenses of administration and taxes, all lawful charges against said estate aggregating the sum of $740.94, were unpaid and unsatisfied, except that the administrator had retained in his hands towards paying his own compensation and the necessary expenses of administration, the sum of $228.75, leaving claims, taxes and necessary expenses of administration unpaid and unsatisfied in the sum of $512.19; and at the time of filing said petition, all the personal property of said estate had been exhausted, save only that the $228.75 aforesaid was in the hands of the administrator, and retained by him towards his compensation and expenses as aforesaid.

5. That said petition did also set forth a description of the real property of the estate, the probable value of the different por-
26 tions or lots thereof, which probable value was the same as the appraised valuations of said property at the time of filing said petition, also did show that there were no liens or encumbrances

against the property, except the street assessments of $66.67 aforesaid, and did show that the real property consisted of three tracts: First, the tract described in the complaint; second, the S. ½ and N. W. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼ of Section 28, Twp. 23 S., of Range 12, West of Willamette Meridian, which the widow Maggie Fletcher claimed exempt as a homestead; and third, the tract being described as block 44, in E. B. Dean & Co.'s Addition to Marshfield; and did also set forth the names, ages and residences of the alleged heirs of the deceased, so far as known; and also did show therein as follows:

"That the said described real property could be sold to a better advantage, and it would be to the interest of the estate, to sell the same at private sale, and could be sold to a better advantage if sold on terms, say one-half down, and the remainder on a mortgage of one or two years.

27 "That the expenses for repairs on said house herein mentioned were necessary, and it was necessary to have said repairs made to keep a tenant on the premises.

"That the rent of said house will not pay the taxes and necessary repairs, after allowing the widow one-half of the rent, as heretofore directed by the court.

"That it would be to an advantage to said estate to sell a portion of said real property in order to settle the estate."

6. That upon the filing of said petition said County Court duly made an order directing that citation issue to persons therein mentioned as the heirs of said Charles W. Fletcher, deceased, and to all others unknown, if any such there be, requiring them to appear at the July, 1902, term of said County Court, and, to-wit, on July 16, 1902, at the Court House, Coquille City, Coos County, Oregon, to show cause, if any exist, why an order of sale of the real property should not be made as in said petition prayed for.

7. That thereafter citation was duly issued out of said court in said matter by the clerk of said court in all respects as by

28 law prescribed, and addressed to said Maggie Young (formerly Maggie Fletcher, widow of said Charles W. Fletcher, deceased), Henry Fletcher and Minnie Fletcher, as alleged known heirs of Charles W. Fletcher, deceased, and to all others unknown and to all persons interested in the estate of said deceased, notifying them of the filing of said petition for an order of sale of the real property belonging to said estate, and particularly describing the first tract and the third tract in said petition for sale of real property mentioned, to-wit, the lands involved in this suit, and the property described as block 44 in E. B. Dean & Co.'s Addition to Marshfield, and requiring them to appear on July 16, 1902, being at the regular July, 1902, term of said court, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for, and the prayer of said petition granted.

8. That said administrator caused said citation to be duly published as by law required and did serve the same upon all the heirs at law, known and unknown, of said Charles W. Fletcher, deceased, by publication thereof, in the Coos Bay News, then, now,

and at all times since, a weekly newspaper published and issued weekly at Marshfield, Coos County, Oregon, and of general circulation, for four successive weeks; except that personal service thereof was had upon said widow, Maggie Young.

9. That thereafter on July 17, 1902, said County Court, after fully considering said petition and due hearing duly made an order of sale of the real property in said citation described, and did find among other things that said citation was duly served upon said Maggie Young, personally, and upon the known and unknown heirs at law of said Charles W. Fletcher, deceased, and all persons interested in said estate by publication according to law, except same was served personally on said Maggie Fletcher Young; and after examining the proofs did find that there were unpaid claims against said estate, including several years' taxes, and the expenses of administration which had not been paid; that it was necessary to sell the real property, or a portion thereof, in order to pay the charges, expenses and claims in said petition, then unsatisfied. That said court did order and decree said administrator to sell the first tract, and the third tract aforesaid, or so much thereof as may be necessary to raise the money to pay such unsatisfied charges, claims and expenses at private sale.

10. That thereafter said administrator in pursuance of said order of sale duly made on July 17, 1902, did duly advertise and notice for sale of said real property, that he would on and after September 25, 1902, offer for sale and sell at private sale said real property. And thereafter on January 20, 1903, said administrator did sell the real property in complaint described to August Nelson for the sum of four dollars per acre, aggregating $640.00, which amount also paid for the dower estate of said Maggie Fletcher Young, widow of said deceased, and on January 21, 1903, did duly file a return and report of said sale.

11. That thereafter said sale was duly and regularly approved and confirmed by said County Court by order made February 3, 1903, and recorded on page 124 of Volume 6 of the Journals of said County Court. That said purchaser, August Nelson, paid for said real property said sum of $640.00 in good faith, and said sale was made in good faith in order to obtain funds to pay the unpaid and unsatisfied claims and expenses of said estate, and said money was duly used for said purposes.

12. That thereafter in pursuance of said sale, the order of confirmation aforesaid, and all the proceedings had in connection with the sale of said real property in said County Court, and the payment of the said sum of $640.00, said administrator, did as such administrator, execute and deliver a deed of said real property, and thereby did convey to said August Nelson, the purchaser, all the right, title, interest and estate which said Charles W. Fletcher, deceased, had in and to said real property at the time of his death; and did also procure and deliver to him the deed of said real property from said widow.

13. That said August Nelson purchased said property in good faith, for the full market value thereof at the time of the purchase of

same. That defendants by mesne conveyances have purchased and acquired said real property, and they and their predecessors in interest purchased same in good faith, relying on the proceedings had for the sale thereof aforesaid; and have paid out taxes and
32 assessments against said real property duly levied, imposed and charged against said premises for the year 1903 up to and including for the year 1911, aggregating the sum of $302.54.

14. That these defendants further allege that if any irregularities or defects occurred in the proceedings had for the sale of said real property, including any defect in the service by publication of said citation, or in any other respect, than that any and all such defects have been cured by what is known as the Curative Act, duly enacted by the Legislative Assembly of the State of Oregon, and filed in the office of the Secretary of State on March 1, 1913; and also cured by the 1907 Curative Act enacted by the Legislative Assembly of said state, filed in the office of the Secretary of State, February 25, 1907.

For a separate and second further defense to each and both the alleged causes of suit in said complaint set forth, allege:

1. These defendants reiterate and reallege each and every allegation of paragraphs numbered 1 to 12 inclusive of the foregoing answer.

2. That John F. Hall, as administrator of the Estate of Charles W. Fletcher, deceased, on April 14, 1904, caused to be filed
33 in the County Court of the State of Oregon for Coos County, his final account as administrator of said estate, and did show thereby that he received from the sale of said real property the sum of $640.00, and did also show that the same had been disbursed and paid out as mentioned in said final account in the payment of claims against said estate, expenses of administration, repairs, taxes, and allowance to the widow in pursuance of the orders and directions of said County Court.

3. That upon the filing of said final account, said County Court duly made an order fixing May 18, 1904, as the time, and the Court House, Coquille City, Oregon, as the place, for the hearing of objections to said final account, and the settlement thereof, and that thereupon said administrator caused due notice to be given of the filing of said final account and the time and place set for the hearing thereof, and caused the same to be published in said Coos Bay News, four successive weeks, first on April 19, 1904, and last on May 17, 1904. That said notice was so published in every number of said paper during said period and times of publication in
34 the newspaper proper. And thereafter on May 20, 1904, said County Court duly made an order approving said final report and allowing the same in whole, and found therein that it was necessary to sell a portion of the real property in order to pay the debts of said estate, to-wit, the real property mentioned in this suit.

4. That it also appears in said final account at the time of the filing thereof and at the time of closing the administration, the administrator believed that the said Henry Fletcher and Minnie E. Fletcher were dead, and that Maggie Young was the only heir at law of said Charles W. Fletcher, deceased.

5. That these defendants, in purchasing said real property on or about July 15, 1907, relied upon said sale proceedings, and that the said sale had been duly confirmed and acquiesced in by said County Court for over four years, and that the final account had been allowed, and that the matters aforesaid appeared therein.

6. That by reason of the matters aforesaid, and by reason of the failure of the plaintiffs, or any of them, failing to object to
35 said final account, and to the allowance of the amounts shown to be disbursed thereby at the time of the hearing thereof, they should now be estopped from claiming that said sale should be set aside or disregarded, or that the same was without authority of law, or that the same is void; but that said plaintiffs should be required by decree of this court, to convey all right, title and interest which Charles W. Fletcher, deceased, at the time of his death, had in and to said real property, by good and sufficient conveyance, if the proceedings had for said administrator's sale be adjudged defective, or insufficient.

For a separate and third defense to the cause of suit and complaint, these defendants allege:

1. Defendants do hereby reiterate and reallege each and every allegation of paragraphs 1 to 13 inclusive of the further answer aforesaid; and also reallege and reiterate the allegations of paragraphs 2 and 3 of the second further defense aforesaid.

2. That the plaintiffs, each and all of them, had due and legal notice that said real property was sold to pay the debts and
36 claims of said estate and the charges and expenses of administration mentioned in the petition for sale of real property, filed as hereinbefore alleged, for over ten years, and particularly since the filing of the final account on April 14, 1904, and have at all times since said sale was made, and at all times since the filing of the final account and the approval thereof by the County Court of the State of Oregon for Coos County, made May 20, 1904, acquiesced in said sale without protest or objection, up to shortly prior to the commencement of this suit. That at the time of the filing of said final account and the approval thereof, the said August Nelson, the purchaser at said administrator's sale, still retained all the right, title and interest which he had acquired in and to said real property at the time of the purchase thereof as hereinbefore stated; and the mesne conveyances by which these defendants have acquired this property were all made subsequent thereto, and the said August Nelson and the said subsequent purchasers, each and all of them respectively, purchased and acquired said real property in good faith, relying upon the proceedings had for the sale of said real property in said estate matter, including the order of con-
37 firmation of said sale, and the acquiescence of all parties interested in said real property and in said sale, since the same was made.

3. That said August Nelson and his successors in interest, including the defendants herein, have paid out and expended various sums for the protection of said real property, in the payment of taxes duly levied and assessed against said real property, for the tax years 1903

up to and including the tax year 1911, aggregating $302.54. That the following statement shows the name of the taxpayer paying the taxes for each such tax year, the respective dates of such payments of taxes, and the net amount thereof for each such year, and to-wit:

Name of taxpayer.	Year.	Date of payment.	Total tax.	Net amt. paid.
Aug. Nelson.....	1903	June 27, 1904	$11.56	$12.95
Aug. Nelson.....	1904	Mar. 21, 1905	9.60	9.60
Aug. Nelson.....	1905	Feb. 20, 1906	11.52	11.17
Aug. Nelson.....	1906	Feb. 16, 1907	17.52	17.00
Miner & Worden...	1908	Mar. 11, 1909	60.00	58.20
Miner & Worden...	1909	Mar. 12, 1910	67.20	65.18
Miner & Worden...	1910	Mar. 10, 1911)	57.60	(43.20
38				
Miner & Worden...	1910	Aug. 19, 1911)	.....	(16.56
Miner & Worden...	1911	Mar. 15, 1912	70.80	68.68

4. That the taxpayer described as Aug. Nelson is identically the same as August Nelson, the purchaser aforesaid, and the taxpayers described as "Miner & Worden" are the defendants in this suit. That said taxes were duly levied, imposed and charged against said real property for each of the said years respectively, and it was necessary to pay the same in order to protect and preserve the title thereto; that the same were paid by each and all of the said taxpayers in good faith, in the honest belief that they were and are the owners in fee of said real property.

5. That the plaintiff, John Motley, at the time of making the alleged or pretended purchase in his complaint stated, knew and understood all the matters hereinbefore alleged in each and every defense herein, and is not a purchaser in good faith, and is not an innocent purchaser.

6. That any heirs of said Charles W. Fletcher, deceased, if any there be besides the said Maggie Fletcher Young, have been guilty of gross laches if any defects there were in the proceedings
39 had for the sale of said real property.

7. That by reason of the matters aforesaid, the heirs of Charles W. Fletcher, if any there be besides Maggie Fletcher Young, and the plaintiffs in this suit, should be estopped from claiming any right, title, interest or estate in or to said real property, or any part thereof.

For a separate and fourth defense to the causes of suit in complaint alleged:

Defendants do hereby plead the statute of limitations and do allege that the causes of suit in complaint alleged, each and both of them, have not been commenced within the time by law limited, and do hereby allege that August Nelson, the purchaser, at the administrator's sale hereinbefore stated and referred to in the complaint, paid the purchase money for said real property on or about January 20, 1903, and that said sale was duly confirmed by order of the County

Court of the State of Oregon for Coos County, made February 3, 1903, and that said sale was made in good faith, and said August Nelson purchased the same in good faith, and paid the full
40 market value of said real property at that time, and said sale has not been set aside by said County Court or Probate Court aforesaid, that said sale has been confirmed and acquiesced in by said County Court and Probate Court at all times since, and more than ten years have elapsed since the confirmation thereof, and since the execution and delivery of the administrator's deed hereinbefore mentioned.

For a separate and fifth defense to the complaint of plaintiff, and by way of cross-complaint, these defendants allege:

1. Defendants reiterate and reallege each and every allegation contained in paragraphs numbers 1 to 12 inclusive of the first further answer to said Amended Complaint.

2. That the defendants, W. H. Miner and Charles Worden, are the owners in fee simple of the following described real property, to-wit:

The N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26 S. of Range 11, West of the Willamette Meridian, in Coos County, Oregon.

3. That the plaintiffs each and all of them claim to have
41 some interest or estate in and to said real property adverse to these defendants. That such claim is wrongful and without right.

4. That defendants are in possession of said real property, and the same is not in the actual possession of another.

For a separate and further cross-complaint against plaintiffs, these defendants allege:

1. That Charles W. Fletcher mentioned in plaintiff's said amended complaint, died intestate in Coos County, Oregon, on or about January 27, 1897, and at the time of his death he was an inhabitant and resident of said county and state, and left assets therein consisting of, with other assets, the following described real property, to-wit:

The N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26 S., of Range 11, West of the Willamette Meridian, in Coos County, Oregon.

2. That on said 27th day of January, 1897, the said Charles W. Fletcher was the husband of Maggie Fletcher, hereinafter mentioned, and at the time of the death of Charles W. Fletcher, the deceased, and said Maggie Fletcher were husband and wife.
42 That said Maggie Fletcher is still living and is of about the age of 54 years, and is now Maggie Young. That as widow of said C. W. Fletcher, deceased, she had a vested dower estate in and to the real property particularly described in the Amended Complaint in this suit, and which is the subject of this suit.

3. That said Maggie Young, on or about January 31, 1903, sold, assigned and conveyed to August Nelson in said Amended Com-

plaint mentioned, the said real property and including all her vested dower interest therein. That by mesne conveyances, said dower interest has been conveyed and assigned to these defendants and they are now the owners and holders of said dower estate.

4. That said dower estate has not been admeasured or assigned.

5. That said real property is chiefly valuable for the timber thereon, and no improvements thereon, and is such, and is so situated that a partition thereof cannot be made without great prejudice to the owners.

6. That in case the plaintiffs prevail in this suit, and are adjudged to be the owners in fee of said property, said Minnie Evvia
43 Stadelman claims an undivided one-fourth interest in said property, Henry Hines Fletcher claims an undivided one-fourth interest therein, and John W. Motley claims the remaining one-half interest therein, and these defendants have the dower estate which said Maggie Fletcher, now Maggie Young, had in and to said real property, and the assignees of said dower estate, and are the owners and holders thereof; that it will be necessary to cause the real property in complaint described to be sold, and that such sum in gross as may be deemed upon the principles of law applicable to annuities a reasonable satisfaction for the dower estate of said widow, shall be decreed to be paid these defendants for said dower estate.

7. That these defendants in making this separate cross-complaint in no way admit that the plaintiffs have any right, title, estate or interest in and to said real property, but say that as they are informed and believe, and therefore allege, that being in equity the owners of the dower estate aforesaid and for the purpose of preventing further litigation, they are entitled to pray that in case
44 they are not adjudged the owners in fee of the real property, which they believe they are, and which they have purchased in good faith as in this answer shown, then that the value of the dower estate be ascertained and ordered paid them out of the sale of the real property.

For a second and separate cross-complaint against plaintiffs, these defendants allege:

1. These defendants reiterate and re-allege each and every matter stated in their first further and separate answer herein.

2. Allege that if the plaintiffs, Minnie Evvia Stadelman and Henry Hines Fletcher are adjudged to be the heirs at law of said C. W. Fletcher, deceased, and if the proceedings had for the sale of said real property and the said administrator's sale aforesaid are void for any reason; and if the court refuses to require the plaintiffs herein to convey said real property to these defendants as prayed for herein; and if the court holds that the statute of limitation does not apply, and prevents the plaintiffs recovering the real property in this suit, then that before the plaintiffs be decreed to be entitled to said real property, or to have the title thereto quieted, or the
45 alleged clouds removed, that they be required to pay these defendants the sum of $640.00, the purchase price of said real property at the administrator's sale of aforesaid, and interest thereon at the rate of six per cent per annum from the date of said

sale, and all taxes paid and expended by these defendants and their predecessors in interest since the said sale; and that the court also require the plaintiffs to pay to said defendants such sum as the court shall adjudge a reasonable compensation for Maggie Young's dower estate in and to said real property on the principles of law applicable to annuities, and that the payment of all said sums be declared a lien upon said real property; and if not paid, then that the court order said real property to be sold, and the proceeds to be applied first to the costs and disbursements of such sale and of this suit, then to the payment of the amounts decreed to be paid to these defendants, and including the reasonable value of the dower estate aforesaid.

Wherefore, defendants pray that plaintiff's complaint and the amended complaint be dismissed and that these defendants have judgment against plaintiffs, jointly and severally, for de-
46 fendants' costs and disbursements in this suit; and for decree quieting defendants' title to lands involved herein; that in case the court find that any of the plaintiffs in this suit are the heirs at law of Charles W. Fletcher, deceased, and that the sale proceedings aforesaid were insufficient to convey the legal title to said premises, then that the plaintiffs be required by decree of this court to convey all the right, title and interest which said C. W. Fletcher, deceased, had in and to said real property at the time of his death, to the defendants, and in such case compel and order conveyances of said property to these defendants, as the assigns of the purchaser thereof at said administrator's sale.

That in case the court should decree that the plaintiffs are the owners of the real property involved in this suit, then that defendants be adjudged the owners of said Maggie Young's dower estate in said lands; that the court order said real property sold, as in a partition suit, and as by law provided; and for that purpose appoint a suitable referee with full power and authority to sell said real property, and pay the costs, disbursements and expenses of
47 sale, and of referee, and of this suit, then pay the defendants said sum of $640.00, and all the taxes which have been paid by them and their predecessors in interest since January 23, 1903, plus interest on all such amounts from the respective dates of payment; also pay these defendants for the said dower estate on the principles of law applicable to annuities such sum as the court shall adjudge a reasonable satisfaction therefor; and that the remainder of the net proceeds be divided as the court shall direct; and for such other and further relief as to the court shall seem meet and equitable.

J. W. BENNETT,
BENNETT SWANTON,
TOM T. BENNETT,
Attorneys for Defendants.

On the 31st day of January, 1914, the plaintiffs filed their reply to said amended answer as follows:

Come now the plaintiffs, and for their reply to the amended

answer of defendants in the above entitled suit admit, deny
48 and allege as follows:

1. Deny each and every allegation, matter or thing in the whole of said amended answer contained and not hereinafter admitted or in this reply, or in the plaintiff's amended complaint affirmatively alleged.

2. Admit all that portion of paragraph numbered 1, on the second page of said amended answer beginning with the word "that" on line numbered 15 of said page and ending with the word "that" on at the end of line numbered 19 of said page.

3. Admit all that portion of paragraph numbered 2 on the second page of said amended answer from the beginning thereof down to and including the name "John F. Hall" concluded on line numbered 28 of said page.

4. Admit all that portion of paragraph numbered 3, on the 16th page of said amended answer from the beginning of said paragraph down to and including the word "defendants" in the third line of said paragraph.

5. Admit paragraph numbered 1, on the 17th page of said amended answer.

Further replying to the so-called "separate" and further "cross-complaint" against plaintiffs which begins on the 17th page
49 of said amended answer, plaintiffs affirmatively allege as follows:

1. That the person mentioned and referred to therein as "Charles W. Fletcher," was, during all of the times mentioned and referred to therein, and until the death of the said Charles W. Fletcher, the lawful husband of Lucinda Fletcher, who was during all of the times mentioned therein a resident and inhabitant of the City of St. Louis, State of Missouri.

2. That the alleged marriage of the said Charles W. Fletcher to the said person named therein as Maggie Fletcher, now Maggie Young, was and is void, by reason of the fact that the said Charles W. Fletcher at the time of the alleged marriage to the said Maggie Fletcher had a lawful wife and was unable to consummate a lawful marriage contract.

Wherefore plaintiffs demand judgment and decree as prayed for in their amended complaint on file in this suit.

HARRY G. HOY,
Attorney for Plaintiffs.

Said suit was tried before the court without a jury and on October 6th, 1914, the court made the following

50 *Findings of Fact and Conclusions of Law.*

Now at this time comes on regularly for final decision the above entitled suit. Plaintiffs appear by their attorney Harry G. Hoy, and the defendants W. H. Miner and Charles Worden appear by their attorneys, J. W. Bennett, Bennett Swanton and Tom T. Bennett. And the court having fully considered the pleadings

in this cause, and all of the evidence adduced at the trial thereof, and the arguments and written briefs of counsel, and being now fully advised in and ready to render its judgment and decree, makes the following as its

Findings of Fact.

1. That the plaintiffs, Minnie Evvia Stadelman and Henry H. Fletcher, are the only children of the Charles W. Fletcher, deceased, mentioned in the pleadings in this suit.

2. That said Charles W. Fletcher died intestate in Coos County, Oregon, on January 27, 1897; and at the time of his death he was the owner in fee simple of the following mentioned and described real property, to-wit:

51 The N. E. ¼ of the N. E. ¼, the W. ½ of the N. E. ¼, and the N. W. ¼ of the S. E. ¼ of Section 21, Township 26 South, of Range 11 West of the Willamette Meridian, in Coos County, Oregon.

3. That on January 27, 1897, the said Charles W. Fletcher was the husband of Maggie Fletcher, and now Maggie Young. That as widow of said C. W. Fletcher, deceased, she had a vested dower estate in and to said real property, which she duly sold and conveyed to August Nelson, and by mesne conveyance said dower estate is vested in the defendants of this suit, which dower estate or right of dower has not been admeasured or assigned.

4. That subsequent to the death of said Charles W. Fletcher, deceased, proceedings were had for the administration of said estate by order of the County Court of the State of Oregon, for Coos County, made March 12, 1897, and said administrator duly qualified as such, and on April 14, 1897, Letters of Administration of said estate duly issued to him.

5. That said administrator continued to act as such until the close of the administration on May 20, 1904. That said ad-

52 ministrator proceeded with the administration of the estate regularly as by law provided. That on June 6, 1902, said administrator filed in said estate matter a petition for the sale of the real property belonging to the estate which the court finds was in all respects sufficient on which to base an order on the sale of real property belonging to the estate, and did show unpaid claims against the estate, as well as unpaid expenses of administration.

6. That upon the filing of said petition said County Court made an order directing citation to issue to the persons named in the petition as the heirs of said Charles W. Fletcher, deceased, and to all others unknown, if such there be, requiring them to appear at the July, 1902 term of said County Court, and to-wit on July 16, 1902, at Court House, Coquille City, Coos County, Oregon, to show cause, if any exist, why an order of sale of the real property should not be made as prayed for in said petition; in pursuance of which order, citation duly issued as by law prescribed addressed to Maggie Young (formerly Maggie Fletcher, widow of said Charles W. Fletcher, deceased.) Henry Fletcher and Minnie Fletcher as alleged

53 known heirs of Charles W. Fletcher, deceased, and to all others unknown, and to all persons interested in the estate of said deceased, particularly describing the real property aforesaid, and other property, and requiring such heirs to appear on July 16, 1902, being at the regular July, 1902, term of said court, to show cause, if any exist, why an order of sale should not be made as prayed for in the petition.

7. That said citation was duly published as by law required in the "Coos Bay News" on June 6, 1902, and at all times since, a weekly newspaper published and issued weekly at Marshfield, Coos County, Oregon, and of general circulation, for four successive weeks, except that personal service was had upon said widow, then Maggie Young. That the date of the last publication of said citation was July 15, 1902, and that ten days did not elapse between the date of the last publication of said citation and the date of the entry of the order of sale.

8. That on July 17, 1902, said County Court, after fully considering said petition and due hearing did purport to make an order of sale of the real property in said citation described, and did
54 find among other things that said citation was duly served upon said Maggie Young, personally, and upon the known and unknown heirs at law of said Charles W. Fletcher, deceased, and all persons interested in said estate by publication according to law, except same was served personally on said Maggie Fletcher Young; and after examining the proofs did find that there were unpaid claims against said estate, including several years' taxes, and the expenses of administration which had not been paid; that it was necessary to sell the real property, or a portion thereof, in order to pay the charges, expenses and claims in said petition, then unsatisfied. That said County Court did purport to order and decree said administrator to sell the first tract, and the third tract, as referred to in the amended answer herein, or so much thereof as may be necessary to raise the money to pay such unsatisfied charges, claims and expenses at private sale.

9. That at the time of the death of said Charles W. Fletcher, and at all times thereafter up to shortly before the commencement of this suit, the place of residence and whereabouts of the
55 plaintiffs, Minnie Evvia Stadleman and Henry Hines Fletcher was unknown to John H. Hall, the administrator of said estate and was unknown to him at the time of the filing of the petition for sale of the real property, and the publication of the citation aforesaid.

10. That the service of the citation by publication as aforesaid on the said Minnie Evvia Stadelman, formerly Minnie Evvia Fletcher, and Henry Hines Fletcher, was insufficient and ineffectual to give the court jurisdiction of said heirs by reason of the fact that ten days were not allowed to elapse between the date of the last publication of said citation, and the time set for the hearing thereof, and that owing to such failure said County Court had no jurisdiction to order the sale.

11. That said administrator in pursuance of said order of sale

did advertise and notice for sale said real property, that he would on and after September 25, 1902, offer for sale and sell at private sale said real property. And on January 20, 1903, said administrator did purport to sell said real property in complaint described to August Nelson for $640.00, which amount also paid for
56 the dower estate of said Maggie Fletcher Young, widow of said deceased, and on January 21, 1903, did make and file a return and report of said sale. That said sale was approved and confirmed by said County Court by order made February 3, 1903, and said sale has at all times since been acquiesced in by said County Court. That said August Nelson purchased and paid for said real property in good faith, and said sale was made in good faith in order to obtain funds to pay the unpaid and unsatisfied claims against said estate and expenses of administration of said estate, and said money was used for said purposes.

12. That in pursuance of said sale, the order of confirmation aforesaid, and all the proceedings had in connection with the sale of said real property in said County Court, and the payment of the said sum of $640.00, said John F. Hall, did as such administrator execute and deliver a deed of said real property, purporting to convey to said August Nelson, the purchaser, all the right, title, interest and estate which said Charles W. Fletcher, deceased, had in and to said real property at the time of his death; and did also
57 procure and deliver to him the deed of said real property from said widow.

13. That said August Nelson paid the purchase money aforesaid, to-wit, $640.00, to said administrator on or about January 20, 1903; that said sum was the full market value of said real property, and that said sale has not been set aside by said County Court or Probate Court aforesaid.

14. That the real property aforesaid descended to Minnie Evvia Stadelman and to Henry Hines Fletcher, two of the plaintiffs in this suit, subject to the payment of the debts of the deceased, and subject to the dower estate or right of dower therein of Maggie Fletcher, as widow of said Charles W. Fletcher, deceased.

15. That the said Minnie Evvia Stadelman and Henry Hines Fletcher have conveyed and transferred an undivided one-half interest in said real property to their co-plaintiff, John W. Motley; and said Minnie Evvia Stadelman now has an undivided one-fourth interest in said real property, Henry Hines Fletcher has an un-
58 divided one-fourth interest therein, and John W. Motley an undivided one-half interest therein subject to the dower estate aforesaid.

16. That said Maggie Fletcher, now known as Maggie Young, on or about January 29, 1903, sold, assigned and conveyed to said August Nelson all her dower right, or dower interest in and to said real property. That by mesne conveyances said dower right or interest has been conveyed and assigned to W. H. Miner and Charles Worden, the defendants in this suit, and they are now the owners and holders of said dower estate which has not been admeasured or assigned.

17. That said real property is chiefly valuable for the timber thereon, and no improvements thereon, and is such, and is so situated that a partition thereof cannot be made without great prejudice to the owners.

18. That under the facts in this case it is necessary that the said real property be sold in order to secure to defendants the value of said Maggie Young's dower estate in and to said real property.

59 19. That the defendants herein are entitled to receive for said dower estate a sum equal to four per cent of the net amount for which said real property shall sell for such period of years from the time of such sale as the said Maggie Young has a life expectancy in accordance with the principles of law applicable to annuities and supervivorship, after deducting defendants' costs of suit, sale and liens, hereinafter mentioned, her present age being ascertained to be 56 years, and such proportion shall be paid to said defendants in lieu of the dower estate in the real property aforesaid acquired by them from said Maggie Young by way of adjustment, settlement and admeasurement of said dower estate, the costs of sale to be first paid out of the sale of said real property.

20. That the moneys which came into the hands of the administrator of said estate were used in the payment of claims against the estate of the deceased, which were liens or charges against said real property and also the payment of expenses of administration and charges incurred during the administration, which were lawfully allowed and paid out by the administrator under orders of said County Court.

60 21. That the defendants herein are entitled to be reimbursed in said sum of $640.00 and interest thereon from January 20, 1903.

22. That said August Nelson and his successors in interest, including the defendants herein, have paid out and expended various sums for the protection of said real property, in the payment of taxes duly levied and assessed against said real property, for the tax years 1903 up to and including the tax year 1911, aggregating $302.54, in the following amounts and at the following times respectively, to-wit:

Taxes for years—	Date of payment.	Amount paid.
1903	June 27, 1904	$12.95
1904	Mar. 21, 1905	9.60
1905	Feb. 20, 1906	11.17
1906	Feb. 16, 1907	17.00
1908	Mar. 11, 1909	58.20
1909	Mar. 12, 1910	65.18
1910	Mar. 10, 1911	43.20
1910	Aug. 19, 1911	16.56
1911	Mar. 15, 1912	68.68

23. That the defendants herein and persons under whom they claim, including the said August Nelson, have acted in the

61 utmost good faith in regard to the purchase of said property, and the defendants herein should in equity and good conscience be decreed to be the owners of said real property, but that the administrator's sale of said real property and through which defendants deraign title, was void by reason of the insufficiency of the service of the citation by said administration proceedings.

24. That the plaintiffs have not acted equitably and have not offered to do equity.

25. That the defendants are entitled to be repaid the said sum of $640.00 and the taxes aforesaid, with interest on said amounts respectively from the date of payment thereof until paid, and said sums are hereby declared to be a first lien and charge on said real property.

JOHN S. COKE, *Judge.*

Dated Oct. 6, 1914.

Based upon the foregoing Findings of Fact, the court makes the following

Conclusions of Law.

1. That the plaintiffs herein are the owners in fee simple of
62 the real property described in the Findings of Fact herein as tenants in common, subject to the dower estate and liens hereinafter mentioned.

2. That the plaintiff, John W. Motley is the owner of an undivided one-half interest therein, and Minnie Evvia Stadelman and Henry Hines Fletcher each having an undivided one-fourth interest therein, subject to the dower estate or dower right of Maggie Young, which is now owned by the defendants, W. H. Miner and Charles Worden and liens hereinafter mentioned.

3. That on January 27, 1897, and at the time of the death of said Charles W. Fletcher, deceased, the said Charles W. Fletcher and Maggie Young, then Maggie Fletcher, were husband and wife, and by reason thereof she acquired a dower estate in and to said real property, which by mesne conveyances is now owned by the defendants herein.

4. That the purported sale of said real property in the proceedings therefore in the matter of the estate of said Charles W. Fletcher, deceased, were and are void, by reason of the failure to allow
63 ten days to elapse from the date of the last publication of the citation and the time set for the hearing thereof.

5. That said proceedings and the administrator's deed based thereon and the subsequent mesne conveyances under which the defendants herein claim title, constitute a cloud upon the title of plaintiffs to said real property, excepting that deed from Maggie Young and husband to August Nelson, and the mesne conveyances from her to the defendants herein conveyed to the defendants the said Maggie Young's dower estate in and to the said real property.

6. That it appears to the satisfaction of the court that the property involved in this suit is so situated that partition thereof cannot be had without great prejudice to the owners, and that the court

should make an order of sale thereof, and appoint some suitable person as referee to make such sale.

7. That in order to determine the value of said dower estate it is necessary that said real property be sold; the defendants are entitled to be paid a sum in gross as upon principles of law applicable to annuities is a reasonable satisfaction for said dower estate, which is hereby ascertained to be a sum equal to four per cent of one-
64 third of the net amount for which said real property shall sell, left after paying the liens aforesaid and defendants' costs and disbursements herein, for such a period of years as is based upon the life expectancy of said Maggie Young at the time of said sale, her age being now 56 years; that the defendants are entitled to recover and have decreed to be a charge on said real property the following sums, to-wit:

1. The $640.00 paid for said real property by August Nelson at the time he purchased the same on January 21, 1903, and interest thereon from said date at the rate of six per cent per annum.

2. The $302.54 taxes paid by the defendants and their predecessors in interest since said sale, and interest on each annual tax charge from the time same was paid, more particularly mentioned in the findings filed herewith.

3. Defendants' costs and disbursements herein to be taxed.

8. That the referee authorized to make said sale shall pay said sums to said defendants plus interest aforesaid, out of the
65 proceeds of said sale after paying the expenses of sale, and then compute the sum in gross to be paid for the dower estate aforesaid in accordance with the Findings and Conclusions, and the overplus pay to the plaintiffs herein, their heirs or assigns.

9. That plaintiffs are entitled to a decree freeing their title from the clouds created by said administrator's deed and mesne conveyances excepting the said dower estate; and subject to the liens or charges aforesaid.

10. That the plaintiffs have not done or offered to do equity herein.

11. That the defendants are entitled to have judgment against plaintiffs for defendants' costs and disbursements in this suit.

JOHN S. COKE, *Judge.*

Dated Oct. 6, 1914.

On the 6th day of October, 1914, the following

Decree.

was entered:

Based upon the Findings of Fact and Conclusions of Law filed this day in this court and cause, the court makes the following decree:

66 It is ordered, adjudged and decreed as follows:

1. That plaintiffs subject to the dower estate, charges and liens hereinafter mentioned, be and they are hereby held to be the owners in fee simple as tenants in common of the real property described in the pleadings in this suit, and particularly as follows, to-wit:

Tne N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26, South of Range 11, West of the Willamette Meridian, in Coos County, Oregon.

2. That the plaintiff, John W. Motley owns an undivided one-half interest therein, and Minnie Evvia Stadelman and Henry Hines Fletcher, each have an undivided one-fourth interest therein, subject to the dower estate, liens and charges hereinafter mentioned.

3. That the defendants herein have and are the owners of the unassigned and unadmeasured estate of dower of Maggie Fletcher, now Maggie Young, therein as the widow of said Charles W. Fletcher, deceased.

4. That the said real property be and the same is hereby freed from the cloud or clouds against the title thereto by reason
67 of the attempted sale thereof by order of the County Court of the State of Oregon for Coos County, made June 6, 1902, in the matter of the estate of Charles W. Fletcher, deceased, by the administrator of said estate, and the administrator's deed of said real property and the subsequent sales and conveyances thereafter made under which the defendants herein claim title to said real property; subject, however, to the following estate, charges and liens, to-wit:

1. The vested estate dower of Maggie Young, formerly Maggie Fletcher, in and to said real property, which is now owned by and the property of, the defendant- herein.

2. The purchase price paid for said real property, by August Nelson to the administrator of the estate of C. W. Fletcher, deceased, to-wit, $640.00, and interest thereon at the rate of six per cent per annum from January 21, 1903, until paid.

3. The taxes paid by said August Nelson and his successors in interest, including the defendants herein, aggregating $302.54 and interest on each such respective annual tax from the time same was paid. That said sums are decreed to be first charges and liens
68 upon said real property, and are hereby ordered paid to defendants herein, plus interest as aforesaid until so paid.

4. That the dates of the respective payments of said annual taxes and the amounts paid on said lands are as follows respectively, to-wit:

Taxes for years—	Date of payment.	Amount paid.
1903	June 27, 1904	$12.95
1904	Mar. 21, 1905	9.60
1905	Feb. 20, 1906	11.17
1906	Feb. 16, 1907	17.00
1908	Mar. 11, 1909	58.20
1909	Mar. 12, 1910	65.18
1910	Mar. 10, 1911	43.20
1910	Aug. 19, 1911	16.56
1911	Mar. 15, 1912	68.68

5. That it appears to the satisfaction of the court that said dower interest or estate can not be set off by metes and bounds without injury to the estate and great prejudice to the owners thereof, and that defendants are entitled to receive a sum in gross for said
69 dower interest, and that a sum equal to four per cent of the net amount for which the real property shall sell at public sale as hereinafter provided left after paying the liens hereinafter mentioned, and defendants' costs in this suit and costs of sale, for such period of years extending from the time of such sale as the said Maggie Young has a life expectancy, in accordance with the principles of law applicable to annuities, which sum is hereby adjudged to be a reasonable satisfaction for such estate, her present age being 56 years, and that such a sum shall be paid to said defendants in lieu of the dower estate aforesaid, and by way of adjustment, settlement and admeasurement thereof.

6. That Arthur McKeown is hereby appointed sole referee for the purpose of making the sale of said real property, and is hereby directed to apply the proceeds first to the payment of the costs and disbursements of this suit and of sale; second, to the payment of the purchase price and taxes aforesaid, and interest thereon at the rate of six per cent per annum from the time the respective amounts aforesaid were paid; third, to the payment of the amount adjudged reasonable satisfaction for the dower estate aforesaid, and the
70 overplus to the plaintiffs, John W. Motley, Minnie Evvia Stadelman and Henry Hines Fletcher, their heirs or assigns, in accordance with their respective interests in said real property.

7. That the defendants in this suit recover their costs and disbursements herein from plaintiffs.

JOHN S. COKE, *Judge.*

Dated Oct. 6, 1914.

71 In the Matter of the Estate of C. W. FLETCHER, Deceased.

John F. Hall administrator of the above entitled estate, having filed his petition herein praying for an order of this court, authorizing the sale of the real estate or a portion of the same belonging to said estate, and it appearing from said petition that it is necessary to sell the whole or some portion of the real estate of said decedent to pay the charges of administration of decedent's estate.

That the names of next of kin or heirs at law of said deceased are as follows:—

Maggie Fletcher, (now Young) widow, residing at Windling, Lane County, Oregon.

Henry Fletcher, a son, whose age and place of residence is unknown.

Minnie Fletcher, a daughter, whose age and place of residence is unknown.

It is therefore hereby ordered, by this Court that the said Maggie Fletcher, (now Young), Henry Fletcher, and Minnie Fletcher, heirs at law of said deceased, and all others unknown, and all persons interested in said estate, appear before the County Court of

Coos County, Oregon, at the Court-house at Coquille City in Coos County, Oregon, on the 14th day of July, 1902, and show cause, if any, why an order should not be granted said Administrator to sell so much of the real estate belonging to said deceased as shall be necessary to pay the claims against said estate, the expenses of administration, and expenses of making such sale.

And it appearing to the court that the place of residence of said Henry Fletcher and Minnie Fletcher is unknown, it is therefore ordered that a citation be published in the "Coos Bay News" a weekly newspaper, printed and published at Marshfield, Coos County, Oregon, four weeks successively, requiring the same Henry Fletcher and Minnie Fletcher, and all others unknown, and persons interested in said estate to appear on the said 16th day of July, 1902, at the Court house in Coquille City, Coos County, Oregon, to show cause if any, why the prayer of the petitioner should not be granted.

L. HARLOCKER, *Judge.*

(Endorsed as follows:) No. 366. In the County Court of the State of Oregon, in and for the County of Coos. Estate of C. W. Fletcher, decd. Order. Filed & entered June 6" 1902. L. H. Hazard, Clerk, by R. H. Mast, Deputy.

Pltf. Ex. "D. O."

Order for Citation.

72 In the County Court of the State of Oregon in and for the County of Coos.

In the Matter of the Estate of CHARLES W. FLETCHER, Deceased.

To Maggie Young, formerly Maggie Fletcher, Henry Fletcher, and Minnie Fletcher, known heirs of Charles W. Fletcher, deceased, and to all others unknown, and to all persons interested in the estate of said deceased:

In the name of the State of Oregon: You and each of you are hereby notified that on the 6th day of June, A. D. 1902, John F. Hall, administrator of the estate of said deceased, filed his duly verified petition in the above entitled court and cause, for an order of sale of the real property belonging to said estate, or such portion thereof as may be necessary to pay claims against said estate and expenses of administration, which said real property, is particularly described as follows, towit:—

North half and South-west quarter of North-east quarter, and North-west quarter of South east quarter of Section Twenty-one Township Twenty-six South of Range Eleven West of Willamette Meridian containing one hundred and sixty acres, more or less.

Block Forty-four in E. B. Dean & Co.'s addition to the town of Marshfield, as surveyed and platted by William Hall, and of record in the office of the County Clerk of Coos County, State of Oregon, all of said real property situated in the County of Coos, State of Oregon.

That upon the filing of said Petition, the County Court of Coos

County, State of Oregon, duly made an order directing that a Citation issue to the heirs at law of said deceased, known and unknown, and to all other persons interested in said estate, citing the said persons to appear at the County Court room, at the Court house in Coquille City, Coos County, Oregon, on July 16th, 1902, to show cause if any exists why the prayer of the administrator should not be granted.

Now therefore in pursuance of said order of said court, you and each of you are hereby notified that you are required to appear at the County Court room in the Court house at Coquille City, Coos County, Oregon, on Wednesday the 16th day of July 1902, to show cause if any exists why the order of sale, as in said petition prayed for, of the above described premises, or a sufficient portion thereof, to pay the indebtedness against said estate and the expenses of administration thereof —.

Service of this Citation is made by publication upon known residents heirs, and unknown heirs, if any, of said deceased, by order of the County Court, Coos County, Oregon, which order is dated June 6th, 1902.

Witness the Hon. L. Harlocker, Judge of said Court, with the seal of said Court affixed thereto this 9th day of June, 1902.

Attest:

[COUNTY COURT SEAL.] L. H. HAZARD,
County Clerk of Coos County and ex-officio Clerk of the County Court of said Coos County, Oregon.

Pltf. Ex. "D. P."
Citation.

73 STATE OF OREGON,
County of Douglas, ss:

I hereby certify that I received the within Citation on the 24th day of June, A. D. 1902; that I served the same on Maggie Young, formerly Maggie Fletcher, within the County of Douglas, State of Oregon, on the 25th day of June, A. D. 1902, by then and there, delivering to said Maggie Young, formerly Maggie Fletcher, in person and personally, a copy thereof, together with a copy of the petition for order of sale of real property in said cause, duly certified to be such copy by L. H. Hazard, County Clerk of Coos County, Oregon.

In Witness Whereof I have hereunto set my hand this 26th day of June, A. D. 1902.

E. L. PARROTT, *Sheriff.*
By —— ——, *Deputy.*

(Endorsed as follows:) "#366. In the County Court of the State of Oregon in and for the County of Coos. In the Matter of the estate of Chas. W. Fletcher, deceased. Citation and Proof of Service. Filed Jul- 3, 1902. L. H. Hazard, County Clerk, by R. H. Mast, Deputy."

Plaintiffs' Ex. "D. P."

74 *Affidavit of Publication.*

STATE OF OREGON,
County of Coos, ss:

I, G. A. Bennett, being first duly sworn, say I a- the Printer of the "Coos Bay News." That said paper is a weekly newspaper, published and issued weekly and regularly at Marshfield, Coos Co., State of Oregon, and is of general circulation in said county and state. That the notice of which the one hereto attached is a true and correct copy was published in said paper once a week for four weeks, being published five times; the first on the 17th day of June, 1902, and last on the 15th day of July, 1902. That said notice was published in the regular and entire issue of every number of the said paper during the said period and times of publication, and that the said notice was published in the newspaper proper and not in a supplement.

G. A. BENNETT.

Subscribed and sworn to before me, this 16th day of July, 1902.

[NOTARIAL SEAL.] BENNETT SWANTON,
Notary Public for Oregon.

Citation.

In the County Court of the State of Oregon in and for the County of Coos.

In the Matter of the Estate of CHARLES W. FLETCHER, Deceased.

To Maggie Young, formerly Maggie Fletcher, Henry Fletcher, and Minnie Fletcher, known heirs of Charles W. Fletcher, deceased, and to all others unknown, and to all persons interested in the estate of said deceased.

In the name of the State of Oregon:

You and each of you are hereby notified that on the 6th day of June, A. D. 1902, John F. Hall, administrator of the estate of said deceased, filed his duly verified petition in the above entitled court and cause, for an order of sale of the real property belonging to said estate, or such portion thereof as may be necessary to pay claims against said estate and expenses of administration, which said real property is particularly described as follows, to-wit:

North half and the southwest quarter of northeast quarter, and northwest quarter of southwest quarter of section twenty-one, township twenty-six south of range eleven west of Willamette Meridian, containing one hundred and sixty acres, more or less.

Block forty-four in E. B. Dean & Co.'s addition to the town of Marshfield, as surveyed and platted by William Hall, and of record in the office of the county clerk of Coos County, state of Oregon, all of said real property situated in the county of Coos, state of Oregon.

That upon the filing of said petition, the county court of Coos

County, state of Oregon, duly made an order directing that a citation issue to the heirs at law of said deceased, known and unknown, and to all other persons interested — said estate, citing the said persons to appear at the County Court room, at the Court house in Coquille City, Coos County, Oregon, on July 16th, 1902, to show cause if any exists, why the prayer of the administrator should not be granted.

Now, therefore, in pursuance of said order of said court, you and each of you are hereby notified that you are required to appear at the County Court room in the Court house at Coquille City,
75 Coos Co., Oregon, on Wednesday, the 16th day of July, 1902, to show cause if any exists, why the order of sale, as in said petition prayed for, of the above described premises, or a sufficient portion thereof, to pay the indebtedness against said estate and the expenses of administration thereof —.

Service of this citation is made by publication upon known resident heirs, and unknown heirs, if any, of said deceased, by order of the county court, Coos County, Oregon, which order is dated June 6th, 1902. Witness the Hon. L. Harlocker, Judge of said Court, with the seal of said court affixed thereto this 9th day of June, 1902.

L. H. HAZARD,
County Clerk of Coos County and ex-Officio Clerk of the County Court of said Coos County, Oregon.

(Endorsed as follows:) "In the County Court of Coos County, Oregon. 366. In the Matter of the Estate of Charles W. Fletcher, deceased. Proof of Publication of Citation." Filed Jul. 17, 1902. L. H. Hazard, County Clerk, by —— ——, Deputy."

Plaintiffs' Ex. "D. Q."

76 In the Supreme Court of the State of Oregon. In Banc.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants.

Appeal from Coos County.

Hon. John S. Coke, Judge.

Argued and submitted on rehearing January 5, 1917.
Affirmed March 7, 1916; 155 Pac. 708.

Harry G. Hoy, for respondents.
Guy C. H. Corliss, for appellants.

MOORE, *J.:*

Reversed.

Filed Jan. 30, 1917. J. C. Moreland, Clerk of the Supreme Court.

77 In Banc.

Appeal from Circuit Court, Coos County.

John S. Coke, Judge.

On rehearing. Former opinion reversed, and judgment below reversed, and suit dismissed.

For former opinion, see 155 Pac. 708.

This is a collateral attack upon the validity of a probate order licensing the sale of real property of a decedent's estate to pay the debts thereof. The material facts are that Charles W. Fletcher, an inhabitant of Coos county, Or., died intestate therein January 27, 1897, seised and possessed of real and personal property in that county. He left surviving Maggie E. Fletcher, as his widow, and Minnie E. Stadelman, a daughter, and Henry H. Fletcher, a son by a former wife, from whom, as it appears from a certified copy of a decree of a court of another state, which was received in evidence, he was divorced. The county court of Coos county, Or., upon Maggie E. Fletcher's verified petition, which set forth the facts necessary to give the court jurisdiction, detailed the property of the estate and estimated the worth thereof, stated the deceased left no will, and gave the names and ages of his heirs and her own residence, but alleged that the residence of the daughter and son named was unknown, appointed as administrator John F. Hall, a citizen and resident of that county, who duly qualified for the trust and entered upon a discharge of his duties. He published notice to creditors and caused to be made and filed an inventory and appraisement of all the property of the estate. In administering thereon the proceeds of the sale of personal property thereof were exhausted, leaving charges, expenses, and claims not all satisfied, whereupon the administrator applied to the county court for an order of sale of the real property, or so much thereof as might be necessary to discharge such obligations. His petition therefor stated that all the personal property had been disposed of by order of that court, minutely detailed the charges, expenses, and claims remaining unsatisfied, as far as could be ascertained, amounting to $512.98, gave a description of the real property and the value of the different portions or lots and the conditions thereof, alleged that there were no liens thereon except the taxes, gave the names and ages of the heirs and the residence of Maggie E. Fletcher, but alleged that the residence of the daughter and son named was unknown, stating what effort had been made to ascertain where they resided, and averred that it was the belief of the administrator that Maggie E. Fletcher, then Mrs. Young, was the only surviving heir.

The county court on June 6, 1902, made findings of fact substantially as set forth in the petition, and ordered that a citation be issued to the heirs and all other persons interested in the estate to appear before that court at the courthouse on July 14, 1902, which was at a day of a regular term of that court, and show cause, if any they

had, why an order should not be granted the administrator to sell so much of the real property of the estate, particularly described in the petition, as might be necessary to pay the debts and expenses mentioned; and that such citation be served upon the decedent's daughter and son, whose residence was found to be unknown, by publication for four weeks in the Coos Bay News, a weekly newspaper published in that county, requiring such heirs and all other persons interested in the estate to appear at the time and place so specified and show cause, if any existed, why the order prayed for should not be granted. The sheriff's return shows that the citation was personally served upon Maggie E. Fletcher. The affidavit of the printer of the Coos Bay News states that the citation, a copy of which is attached to the sworn declaration, was published in the regular issues of that newspaper once a week for five successive issues; the first appearing June 17, 1902, and the last on July 15th of that year. Predicated on such proof the county court on July 17, 1902, found that it was necessary to sell, with other land, the following described real property: The southwest quarter of the northeast quarter, the north half of the northeast quarter, and the northwest quarter of the southeast quarter of section 21, township 26 south, range 11 west, of the Willamette meridian, to pay the debts of the estate and the expenses of the administration. The court further found that the citation had been duly served; that the time for filing objections to the petition for the sale of land had expired, and that no person had appeared or filed objections to the granting of the license prayed for, whereupon it was ordered that the administrator be and he was authorized to sell the real property particular described or so much thereof as might be necessary to pay the debts and expenses of the estate; that such land be disposed of at private sale to the highest bidder, one-half of the purchase price to be paid in cash on the day of sale, and the remainder to be evidenced by a promissory note payable in a year with legal interest and secured by a mortgage of the premises. Founded on such license the administrator duly advertised the sale of such land as provided by law and received only one bid therefor, that of August Nelson of $640, which sum was also to be in payment of Maggie E. Fletcher's dower right. The offer was accepted, and upon the administrator's report the county court on February 3, 1903, duly confirmed the sale, whereupon the administrator's deed and a conveyance of the dower right were executed to the purchaser.

Thereafter this suit was instituted by Mrs. Stadelman, her brother, and J. W. Motley, to whom an undivided one-half of the land had been conveyed, against W. H. Miner and Charles Worden, who
78 had succeeded to all the interest of August Nelson in the real property hereinbefore described, to quiet the title thereto. The cause being at issue was tried, and from the evidence received findings of fact and of law were made; and based thereon a decree was given for the relief prayed for in the complaint, but the defendants were awarded $640, the purchase price of the land, and interest thereon from January 21, 1903, and the further sum of $302.54, which they had paid as taxes imposed on the premises. The court

found that Maggie E. Young, as the widow of deceased, had an unassigned dower right in the land, which annuity at her age was equal to 4 per cent. of the present value of the premises, and further decreed that the real property be sold and from the proceeds arising therefrom that there be paid the sums so awarded, and if any money then remained it should be paid over to the plaintiffs. From this decree the plaintiffs and the defendants separately appeal.

Guy C. H. Corliss, of Portland, for appellants. Harry G. Hoy, of Marshfield, for respondents.

MOORE, *J.*:

(After stating the facts as above:)

At a former hearing of this cause it was practically conceded that the administrator's deed was void on the ground that the order licensing the sale of the land was prematurely granted, but it was contended that the curative acts of 1907 (Laws 1907, p. 330; L. O. L. § 7156) and 1913 (Gen. Laws Or. 1913, c. 363, § 3) remedied the infirmity. It was ruled, however, that these remedial statutes could not infuse life into any proceedings that never had vitality. Stadelman v. Miner, 155 Pac. 708. A rehearing herein having been granted, it was maintained thereat by defendants' counsel that, though the license to sell the land was granted too soon, the citation had been duly served upon the heirs by publication for the required time, and that such order of sale was not void, and therefore not vulnerable to collateral attack. The statute regulating the procedure in cases like that under consideration reads:

"Upon the filing of the petition a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." L. O. L. § 1254. "Upon an heir or devisee unknown or nonresident, it may be served by publication in a newspaper published in the county chosen by the administrator or executor not less than four weeks." Id. § 1255.

[1] The 4 weeks and 10 days thus limited means 38 days to be computed by excluding the first day of publication of the citation and including the day upon which the order of sale of the land is made. O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Horn v. United States Mining Co., 47 Or. 124, 81 Pac. 1009. Omitting June 17, 1902, the day of the first publication, it will be seen that the time specified expired July 24th of that year. The license having been granted July 17, 1902, the order was made a week too soon. The service of the citation, though constructively made, was as completely performed July 14, 1902, the expiration of the 4 weeks specified in the order, as if the service had been personally made by a proper officer upon Mrs. Stadelman and her brother. L. O. L. § 1254. From that time the county court was deemed to have

acquired jurisdiction and to have had control of all the subsequent proceedings. Id. § 63.

The service of the citation having been completed, does the order of sale which was thereafter prematurely made render the subsequent proceedings void or voidable? If the latter only, though the license which was granted might have been set aside on a direct attack, it was unassailable in any other manner. Thus in Woodward v. Baker, 10 Or. 491, it was decided that when a defendant had been personally served with a summons and a copy of the complaint, a judgment thereafter prematurely rendered against him, as for want of an answer, was voidable only, and not subservient to collateral attack. In Altman v. School District, 35 Or. 85, 88, 56 Pac. 291, 292 (76 Am. St. Rep. 468), Mr. Justice Bean, in speaking of the defendant quasi corporation, says:

"The fact that it was not given all the time allowed by law after the service of the summons in which to plead will not vitiate the judgment or make it subject to collateral attack."

In Murray v. Purdy, 66 Mo. 606, it was ruled that an approval of an administrator's sale when made at a term prior to that prescribed by law was not void, but voidable only, criticizing earlier decisions of that court to the contrary. In Sims v. Gray, 66 Mo. 613, 616, it was held that an administrator's deed was not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made instead of at a subsequent term, as required by law. In deciding that case Mr. Justice Hough remarks:

"When the petition for the sale of the real estate was filed and publication was made, notifying all persons interested in the estate that, on a day named, an order for the sale thereof would be made, unless cause to the contrary should be shown, the heirs were in court; and no other or further notice was required, by law, to be given to them of any subsequent proceedings in the cause. The court was a court of record, having complete jurisdiction of the subject-matter of the proceeding, and while such jurisdiction must be exercised according to law, yet if the court exceeds its powers under the law, and disregards the statutory requirements established for its guidance, its acts may be irregular or erroneous, but they will not be void. Johnson v. Beazley, 65 Mo. 250 [27 Am. Rep. 276]. A judgment rendered after notice, but sooner than it should have been rendered according to the rules of law, or the practice of the court, is simply an irregular judgment, and may be set aside on motion, in any court of record, at a subsequent term."

79 To the same effect see, also, Wilkerson v. Allen, 67 Mo. 502; Snyder v. Markel, 8 Watts (Pa.) 416. In Woodward v. Baker, 10 Or. 491, it will be remembered the premature judgment there rendered was based upon the personal service of a summons and a complaint. In Moore Realty Co. v. Carr, 61 Or. 34, 39, 120 Pac. 742, 744, it was determined, however, that a defect in the service of a summons by publication did not render the judgment founded thereon void. In deciding that case Mr. Chief Justice Eakin, speaking for the court, says:

"The rule seems to be that, if there is actually some notice to the defendant, it is sufficient on a collateral attack, and the irregularity or defect in the service or lack of compliance with the statute does not render the judgment void, but merely voidable."

The rule thus stated is abundantly sustained by authority. Clay v. Bilby, 1 Ann. Cas. 917. In a note to that case at page 923 it is said:

"The same principles are applicable in cases where the service is by publication. If there is actually some notice, an irregularity in the publication does not necessarily render the judgment void and cannot be taken advantage of collaterally"—citing many cases.

[2, 3] When a defendant in a civil action is personally served with a summons and a complaint whereby he is notified to appear and answer at a time and place specified, if a judgment be prematurely rendered against him, he can have the irregularity corrected by appearing on the return day and interposing a motion for that purpose. If he do not thus move in the matter and offer no valid excuse for his delay, it should be taken for granted that he had no sufficient defense, and for that reason is justly bound by the final determination which, though voidable, cannot be collaterally assailed. So, too, when complete service by publication is made of process, and before the return day thus specified the relief sought is granted, the party affected thereby may at any time within a year from the entry of the judgment, when rendered upon such service, be allowed to defend on such terms as may be just. L. O. L. § 59. If he do not within the time thus limited move to set aside such irregular judgment, it should be treated as voidable only and not vulnerable to collateral attack. In the case of service of process by publication if the party to be affected thereby never receives the notice designed to be imparted, he cannot be expected to appear at the place designated on the specified return day; but as the statute allows him a year after the entry of the judgment in which to apply for leave to defend the suit or action, and grants to the party who is personally served only the day appointed, such difference in time should be treated as ample compensation for the dissimilarity in the mode of service. With an exercise by counsel for a moving party of all the care that can reasonably be bestowed, it frequently happens that the parties intended to be affected by the service of process by publication never obtain any knowledge thereof until more than a year after the judgment or decree has been rendered against them, and then too late to apply for leave to set the final determination aside and to interpose a defense. Notwithstanding such possible results the court secures jurisdiction of the person by the publication of the process for the prescribed period, and because the judgment may be rendered against the party after such service is completed, but prior to the return day, which extension is allowed by law and intended to be sufficient to enable the party so served to make the journey by ordinary means of travel from his residence to the place of trial at the appointed time, the final determination so rendered in the case supposed ought not to be regarded as void, but voidable only. In such case, if the party intended to be served by publication of the process had no knowledge thereof, he could not have

appeared at the time and place designated; and, this being so, the premature rendition of the judgment could not have seriously prejudiced him.

[4] It is not charged that the administrator was guilty of fraud in the publication of the citation, or that he did not exhaust every reasonable source of information to ascertain the residence of the decedent's daughter and son so as to mail to them copies of the citation. Under such circumstances, though the order of the county court licensing the sale of the land to pay the debts of the estate was prematurely granted, such final determination is not void, but voidable only; and, this being so, its validity cannot be collaterally challenged.

The deduction thus made renders it unnecessary to consider any other question involved. The decree is, therefore, in all respects reversed, and the suit dismissed; a conclusion which would have been reached at the former trial if the argument last adduced had then been made.

80 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of October, 1916,

On this Tuesday the 30th day of January 1917, the same being the fortieth judicial day of said term, there were present:

Thomas A. McBride, Chief Justice,
Henry J. Bean, Associate Justice,
Henry L. Benson, Associate Justice,
Lawrence T. Harris, Associate Justice,
Frank A. Moore, Associate Justice,
George H. Burnett, Associate Justice,
Wallace McCamant, Associate Justice,
J. C. Moreland, Clerk,

whereupon, among others, the following proceedings were had:

In Bank.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Appellants.

Appeal from Coos.

This cause having on the 21st day of January, 1916, been duly tried, argued and submitted to the court and then reserved for further consideration, and on the 7th day of March, 1916, a decree was entered in this court duly affirming the decree of the court below, and a rehearing having been granted and the same having on the

9th day of January, 1917, been duly tried, argued and submitted upon such rehearing upon all questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of this court rendered and entered herein on the 7th day of March, 1916, be and the same is in all things annulled and set aside. And it is further ordered, adjudged and decreed by the court that the decree of the court
81 below in this cause rendered and entered be and the same is in all things reversed and set aside.

And the court having duly considered the allegations of the parties and the testimony produced, finds that the equities of the case are with the appellants, and that the respondents have not made out a case entitling them to any equitable relief. It is therefore ordered, adjudged and decreed by the court that the respondents take nothing by their complaint and that their suit be and it is dismissed.

And it is further ordered that appellants recover of*f* and from the respondents their costs and disbursements in this court taxed at $—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken, with directions to enter a decree in accordance herewith, and award appellants their costs and disbursements in the court below.

82 In the Supreme Court of the State of Oregon. In Banc.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants.

Appeal from Coos County.

Hon. John S. Coke, Judge.

Affirmed March 7, 1916 (155 Pac. 708), and reversed on rehearing January 30, 1917.

Harry G. Hoy, for respondents.
Guy C. H. Corliss, for appellants.

MOORE, *J.*:

Denied.

Filed Mar. 27, 1917. J. C. Moreland, Clerk of the Supreme Court.

83 Burnett and Bean, JJ., dissenting.

In Banc.

Appeal from Circuit Court, Coos County.

John S. Coke, Judge.

On second petition for rehearing. Opinion on first rehearing, reversed former opinion and decree below, affirmed.

For former opinions, see 163 Pac. 585, and 155 Pac. 708.

Guy C. H. Corliss, of Portland, for appellants. Harry G. Hoy, of Marshfield, for respondents.

MOORE, *J.*:

It is contended in a petition for rehearing that in reversing the decree herein errors were committed: (1) In holding this suit to be a collateral attack; (2) in concluding a county court while transacting probate business in a tribunal of general and superior jurisdiction; and (3) in determining the citation issued by that court was valid. This suit was brought to quiet the title to real property, which right of ownership and possession was alleged to have been disturbed by the execution of an administrator's deed. It is argued by plaintiffs' counsel that, though bills of review have been abolished in Oregon (L. O. L. §390), the form only of the procedure has been changed, while the relief anciently granted by a suit to review, correct, or reverse a decree remains; and, this being so, this suit is a direct attack to impeach and set aside an order of the county court, whereby it attempted illegally to deprive the plaintiffs of their land. That a suit in equity may be maintained in this state to set aside the final judicial determination reached in another cause is settled by repeated adjudications. Crews v. Richards, 14 Or. 442, 13 Pac. 67; Friese v. Hummel, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610; Campbell v. Snyder, 27 Or. 249, 41 Pac. 659; Nessley v. Ladd, 30 Or. 564, 48 Pac. 420; Hilts v. Ladd, 35 Or. 237, 58 Pac. 32; McLeod v. Lloyd, 45 Or. 67, 75 Pac. 702; Smith v. Nelson, 46 Or. 1, 78 Pac. 740; Livesley v. Johnston, 48 Or. 40, 84 Pac. 1044. Such suit, however, is not necessarily a direct attack, though it was so held in Heatherly v. Hadley, 4 Or. 1.

In Morrill v. Morrill, 20 Or. 96, 101, 25 Pac. 362, 364 (11 L. R. A. 155, 23 Am. St. Rep. 95), in a suit to set aside a decree of partition it was said:

"This is undoubtedly a collateral attack. It is an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree."

In referring to the language so quoted a noted author remarks:

"This definition assumes that a proceeding to annul or enjoin is always direct. It is direct only when pursued in the time and manner provided by law against one who is not a bona fide purchaser." Van Fleet, Col. At. §3.

Though the doctrine announced in Heatherly v. Hadley, supra, has not been overruled, it has never been followed. In a note to the case of Morrill v. Morrill, supra (23 Am. St. Rep. 95, 103), it is said:

"All irregularities in the exercise of a court of general jurisdiction are cured by final judgment, and it cannot be collaterally attacked."

In another note to that case (11 L. R. A. 155) it is observed:

"Judgments cannot be collaterally assailed for mere errors or irregularities. They can be assailed only when void, or when rendered without jurisdiction."

Adopting the views thus expressed, it is settled in this state that the suit at bar is a collateral attack upon an order of a county court directing a sale of land belonging to the estate of a decedent to pay the debts thereof. Finley v. Houser, 22 Or. 562, 30 Pac. 494; Belle v. Brown, 37 Or. 588, 61 Pac. 1024; Saylor v. Banking Co., 38 Or. 204, 62 Pac. 652; Meinert v. Harder, 39 Or. 609, 65 Pac. 1056; Smith v. Whiting, 55 Or. 393, 106 Pac. 791; Mansfield v. Hill, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; Harpold v. Arant, 64 Or. 376, 130 Pac. 737; Purdy v. Winter's Estate, 79 Or. 614, 156 Pac. 285; Johnstone v. Chapman Timber Co., 79 Or. 674, 156 Pac. 286.

It is insisted by plaintiffs' counsel that section 9, art. 7 of the Constitution of Oregon, expressly declaring county courts to be inferior tribunals and subject to the appellate jurisdiction and control of the circuit courts, governs the determination of this cause. In support of the assertion thus made attention is called to the case of Garnsey v. County Court, 33 Or. 201, 54 Pac. 539, 1089, and Farrow v. Nevin, 44 Or. 496, 75 Pac. 711, which were writs of review, or certiorari, to annul allowances made by county courts of claims against estates of decedents. In the first case the writ was treated as a collateral attack, while in the second it was considered to be direct. The attack in each instance, though assailing an order of the county court made in the transaction of probate business, was certainly direct because the writs of review, which in such cases are concurrent with the right of appeal, were sued out in the time and manner limited by the statute to correct judicial errors apparent on the face of the record. L. O. L. §605; Van Fleet, Col. At. §3; Malone v. Cornelius, 34 Or. 192, 55 Pac. 536; Title Abstract Co. v. Nasburg, 58 Or. 190, 113 Pac. 2. In Garnsey v. County Court, supra, it was held that a county court, sitting for the transaction of probate business, was an inferior tribunal, citing as sustaining that conclusion the case of Kirkwood v. Washington County, 32 Or. 568,
84 571, 52 Pac. 568, which was a writ of review challenging an order relating to the collection of taxes, a matter pertaining wholly to county business. If an inferior court as there defined is one from which an appeal will lie, it necessarily follows that circuit courts in Oregon are judicial tribunals of that class, for their judgments and decrees are reviewable on appeal; but such courts are conceded to be general and superior, and hence the definition so given is inapplicable. The conclusion reached in Garnsey v. County Court, supra, and in Farrow v. Nevin, supra, so far as they in effect relate to collateral attacks, are diametrically opposite, thus dem-

onstrating that both cannot be correct expressions of the law. It may well be doubted if either decision is proper on the ground that a writ of review will not lie from the action of a county court in probate matters, for to admit that a precept of that kind is available in such cases is to concede that the county court while transacting business pertaining to the settlement of a decedent's estate is an inferior tribunal, a conclusion which is at variance with every other decision rendered by this court on that subject.

In the transaction of county business the county judge usually sits with the county commissioners, which officers when thus assembled at the time and place appointed by law, though exercising administrative and executive duties concerning the financial affairs of the county, its police powers, and its corporate business, are not designated as the board of county commissioners, but are called the county court. Const. Or. art. 7, §12; L. O. L. §937. When the county commissioners and the county judge are thus sitting for the transaction of county business, such county court is an inferior tribunal. Const. Or. art. 7, §9; Thompson v. Multnomah County, 2 Or. 34, 40; Johns v. Marion County, 4 Or. 46, 49; State v. Officer, 4 Or. 180, 183; Bewley v. Graves, 17 Or. 274, 282, 20 Pac. 322; State v. Myers, 20 Or. 442, 444, 26 Pac. 307; Cameron v. Wasco County, 27 Or. 318, 321, 41 Pac. 160; Grady v. Dundon, 30 Or. 333, 336, 47 Pac. 915; Kirkwood v. Washington County, 32 Or. 568, 52 Pac. 568; Munroe v. Thomas, 35 Or. 174, 175, 57 Pac. 419. Section 1, art 7, of the organic law of the state, as far as important herein, reads:

"The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution."

This clause was amended by an exercise of the initiative power at a general election held November 8, 1910. Laws 1911, p. 7. The changes thus authorized, however, have never been made. The county court has been given exclusive original jurisdiction in all probate matters. L. O. L. §936. In construing these provisions together, it has uniformly been held that a county court in the transaction of probate business is a tribunal of general and superior jurisdiction, and its orders in such cases are not subject to collateral attack. Russel v. Lewis, 3 Or. 380; Tustin v. Gaunt, 4 Or. 305; Monastes v. Catlin, 6 Or. 119; Bewley v. Graves, 17 Or. 274, 20 Pac. 322; Richardson's Guardianship, 39 Or. 246, 64 Pac. 390; Slate's Estate, 40 Or. 349, 68 Pac. 399; Smith v. Whiting, 55 Or. 393, 106 Pac. 791; Hillman v. Young, 64 Or. 73, 127 Pac. 793, 129 Pac. 124; Yeaton v. Barnhart, 78 Or. 249, 150 Pac. 742, 152 Pac. 1192. To the same effect, see Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358, 3 Ann. Cas. 231; In re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76.

The statute referring to the application of an administrator or executor for an order to sell real property belonging to the estate of a decedent, to discharge the debts thereof, reads:

"Upon the filing of the petition a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." L. O. L. §1254.

The citation put forth and complained of in this suit was served by publication for the required time, informed Henry Fletcher, his sister, and all others interested in the estate of Charles W. Fletcher, deceased, that the administrator thereof had filed in the county court his verified petition for an order to sell the real property of the estate or so much thereof as might be necessary to pay the claims and expenses against the estate, particularly describing the land, and notified such parties that the county court had made an order directing a citation to be issued to them, requiring them to appear at a time and place as hereinafter designated—

"to show cause, if any exists, why the prayer of the administrator should not be granted. Now, therefore, in pursuance of said order of said court, you and each of you are hereby notified that you are required to appear at the county courtroom in the courthouse, at Coquille City, Coos county, Or., on Wednesday, the 16th day of July, 1902, to show cause, if any exists, why the order of sale, as in said petition prayed for [—] of the above described premises, or a sufficient portion thereof to pay the indebtedness against said estate and the expenses of administration thereof."

The citation also stated that service thereof was made by publication pursuant to the county court's order of June 6, 1902, was signed by the county clerk three days thereafter, and sealed with his official seal. An examination of this citation will show that in the space indicated by brackets the phrase "should not be made for the sale," or other words of equivalent import, were omitted. When, however, that notice is considered in its *entirety*, no doubt can possibly exist in respect to the purpose for which the heirs of Charles W. Fletcher were required to appear in the county court, and
85 probably for that reason their counsel takes no exception to such omission. Objection is made to the failure of the citation to state that the time in which such parties were required to appear was at a term of the county court provided by section 1254, L. O. L., and it is contended that by reason thereof the process was void in its face. Some of the cases cited as sustaining such view will be examined. In Hunsaker v. Coffin, 2 Or. 107, the summons served upon the defendant required him to appear and answer the complaint "forthwith," when under the law then in force a summons was made returnable on the first day of the next term of court. The defendant in that action having failed to appear as notified, a default judgment was rendered against him on the next day after such service was made. Several years thereafter application was made for leave to issue execution on the judgment in order to prevent the statute of limitations from running against it, and, the cause having reached this court, it was held that such judgment was

void. In that case the law having fixed a particular day for the return of the process, thereby prescribed the time for holding the court, and not the time the court sat for transacting business. 11 Cyc. 726; Gird v. State, 1 Or. 308. In the case at bar the statute makes a citation returnable at a term of the county court, and not at a particular day thereof, as in the case relied upon. In that case, however, under the rule now generally prevailing, the judgment there rendered would not be regarded void, and thus vulnerable to collateral attack, because the summons having been personally served upon that defendant, who was presumed to know the law prescribing the return day, he should have specially appeared on the first day of the next term and moved to set aside the judgment.

The case of Northcut v. Lemery, 8 Or. 316, was a collateral attack upon a decree of divorce pursuant to which the plaintiff by mesne conveyances obtained a deed of a tract of land. There was no evidence of the service of a summons upon the defendant in the divorce suit other than a recital in the decree rendered therein as follows:

"And it further appearing that defendant had been served by publication as required by law."

The statute then in force applicable to such cases required the service of a summons when made upon a non-resident to be published four weeks. The period thus limited could not possibly have elapsed when the divorce was granted, and it was held by this court that jurisdiction of the person of the defendant in that suit had never been secured. The facts there stated are not applicable to the case at bar, for here the citation was published for the required time before the order for the sale of the land was made by the county court.

In Wright v. Edwards, 10 Or. 298, which was a collateral attack upon the order of a county court directing the sale of the realty of a decedent's estate to pay the debts thereof, it was held that the application upon which the order was predicated did not state facts sufficient to invoke an exercise of jurisdiction of the court so as to authorize it to grant the prayer of the petition, and for that reason the order was determined to be void. In the case at bar the petition was adequate for that purpose.

In White v. Johnson, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726, the defendant died after that action was commenced, but before the summons was served, whereupon the cause was continued, by order of court, against Cordelia Johnson, the decedent's executrix, who was allowed ten days in which to answer the complaint. The title of the cause was not changed by making her a party, and in the absence thereof the original summons, and copies of the complaint and of the order continuing the cause were personally served upon her. She appeared specially in the trial court for that purpose only, and moved to set aside the attempted service of process. The motion was denied, and, the executrix declining to plead, judgment was rendered in favor of the plaintiff for the sum demanded in the complaint, and she appealed. In reversing the judgment it was held that as the statute required a summons to contain the names of the parties to the action and the title thereof and to be directed to the de-

fendant, such service did not give the court jurisdiction to render a judgment by default against the administratrix in her representative capacity. It will thus be seen that the question presented to this court was raised by an appeal which was a direct attack upon the judgment.

In Smith v. Whiting, 55 Or. 393, 106 Pac. 791, which was a collateral attack upon the validity of a probate order directing the sale of real property belonging to a decedent's estate, it appeared that the citation addressed to the parties interested therein was served by publication notwithstanding some of them resided in Oregon, as to whom it was held that the order to sell the land was void. In that case there was no service whatever as to the parties residing in this state, a fact which will be hereinafter mentioned.

In Sanders v. Rains, 10 Mo. 470, it was ruled that a summons issued by a justice of the peace and made returnable in a time less than that allowed by law was void, that a judgment by default rendered on the service of such summons was also void, and that the party acquired no title under a sale on an execution issued upon such judgment, which final determination was subject to collateral attack on the ground that it was void. The judgment there complained of was given by a court of inferior jurisdiction, and has no application to the case at bar.

In Thompson v. Patterson, 2 Miles (Pa.) 146, a summons issued out of the district court of Philadelphia, and made returnable
86 at a day not authorized by law, was held bad, and quashed upon a motion interposed in that court in proper time. That was certainly a direct attack.

In Crowell v. Galloway, 3 Neb. 215, under a statute which directed that a summons should be returnable on the second Monday after its date, it was held that if such process were made returnable at any other time, it was void, and no jurisdiction of the defendant was secured, but that, if such party intended to rely upon the want of power to hear and determine the cause, he should have appeared specially for that purpose only, but by his general appearance he acknowledged jurisdiction, and the judgment so rendered against him was affirmed on appeal. It will thus be seen that the attack was not collateral, and the decision rendered on appeal is not in point here.

In State v. Parks, 34 Okl. 335, 126 Pac. 242, it was decided that a summons issued March 6th and returnable in ten days, but which process required the defendant to appear and answer March 26th, should have been quashed on motion. That was a direct attack; and had a motion of that kind been interposed in the county court of Coos county, Or., within the time prescribed by law, the order of sale of the land might have been set aside in consequence of irregularities in the citation which was published.

In North Pacific Cycle Co. v. Thomas, 26 Or. 381, 385, 38 Pac. 307, 46 Am. St. Rep. 636, Mr. Chief Justice Bean, in speaking of the service of process, says:

"There is an important difference between a want of jurisdiction and a mere defect in obtaining it. In the former case the judgment

is absolutely void, and may be impeached whenever it is sought to be used as a valid judgment; but in the latter case it is simply erroneous and voidable, and can be attacked only in some direct proceeding authorized by law. When there is some irregularity in the form of the process, or in the manner of its service, the party served can take advantage thereof by some appropriate proceedings in the court where the action is pending, and by neglecting to do so he waives the irregularity and cannot attack the judgment in a collateral proceeding."

In Moore Realty Co. v. Carr, 61 Or. 34, 39, 120 Pac. 742, 744, Mr. Chief Justice Eakin, in discussing the service of process by publication, says:

"The rule seems to be that, if there is actually some notice to the defendant, it is sufficient on a collateral attack, and the irregularity or defect in the service or lack of compliance with the statute does not render the judgment void, but merely voidable. The following cases are all collateral attacks upon judgments or decrees rendered on service for [by] publication, and it was held in each that, although the service was defective or irregular, it did not render the judgment void, and was sufficient against a collateral attack" (citing many cases).

In commenting upon the same legal principal, in Quarl v. Abbett, 102 Ind. 233, 240, 52 Am. Rep. 662, Mr. Justice Elliott, a noted author and distinguished jurist, observes:

"Where there is some notice, although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction (citing authorities). The rule with respect to notice by publication is the same as to notice by service of summons; there is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as of right, to open the judgment and try the cause. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law. 3 Bl. Com. 283, 244; Hahn v. Kelly, 34 Cal. 391 [94 Am. Dec. 742]. There is therefore no valid reason why the same presumption should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect" (citing cases).

In Wilson v. Wilson, 255 Mo. 528, 164 S. W. 561, in applying for authority to sell real property belonging to a decedent's estate, the process published required the persons named therein to appear "before" instead of "at" the day fixed in the order, and it was held that the mistake was a harmless irregularity.

By the citation which was published in the case at bar for the required time Henry Fletcher and his sister were informed when and where they were required to appear, and the time so designated was at a day of the regular term of the county court. Under the rule announced in North Pacific Cycle Co. v. Thomas, supra, and followed in Perry v. Gholson, 39 Or. 438, 65 Pac. 601, 87 Am. St. Rep. 685, and in Stanley v. Rachofsky, 50 Or. 472, 93 Pac. 354, though the citation was irregular in the respects mentioned, the order based

thereon is not void, and for that reason we adhere to the opinion reversing the decree.

Benson and Harris, JJ., concur in the result. McCamant, J., took no part in the consideration hereof.

BURNETT, *J.* (dissenting):

In this case the so-called citation upon which depends the jurisdiction of the county court to divest the plaintiffs of their property was issued on June 6, 1902, and required the heirs at law of the decedent—

"and all others unknown, and all persons interested in said estate, to appear before the county court of Coos county, Or., at the courthouse at Coquille City, in Coos county, Or., on the 14th day of July, 1902, and show cause," etc.

It is said that this citation was served by publication for four we-ks. Under any computation of that period, the service of the citation was not complete until some time after the first Monday in July of that year. Section 1254, L. O. L., which had stood in that form since the original enactment of 1862, declares:

"Upon the filing of the petition a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause,
87 if any exist, why an order of sale should not be made as in the petition prayed for."

It is a plain requisite of a citation that the term at which the heirs must appear shall be mentioned therein. It is equally mandatory that there shall be a lapse of not less than ten days after the service is complete until the term occurs which is to be designated in that document. In the citation, however, no term of court is specified. The times of holding court are fixed by law and are presumed to be known by every one. It is the intent of the statute that citations are to be made returnable with reference to dates thus within general knowledge, and nothing else can be made the standard. The heirs can be bound only by a notice framed in the terms of the statute. Anything less than or different from that is not sufficient to confer jurisdiction to deprive them of their property. The instrument in question does not measure up to the plain commands of the statute, and they cannot rightly be frittered away by mere construction which is but little short of judicial legislation. At the time the proceedings in question were had, it was the law that:

"There shall be a term of the county court convene in each of the several counties of this state for the transaction of probate and all other civil business cognizable by county courts, except the transaction of county business, on the first Monday in each month." B. & C. Comp. § 2522.

Section 936, L. O. L., defines the jurisdiction of the county court in probate matters. Section 946, L. O. L., prescribes the order of business of the county court at each term, the second subdivision reading thus:

"2. The business pertaining to a court of probate as defined and specified in section 936."

Section 947, referring to the county court, says:

"The court is always open for the transaction of the business mentioned in subdivision 2 of the last section, whenever the particular proceeding or transaction is authorized to be had or done without the presence of or notice to another."

This section manifestly refers only to ex parte transactions, and cannot be held to include matters of the kind involved which depend for jurisdiction upon notice to the parties.

This is not a question of serving a valid process upon the defendants therein and taking a decree prior to the expiration of the period of service. It is a question of publishing that which is not process because it does not comply with the requirements of the statute defining the citation and prescribing what it shall contain. It will not do to say that because the return day might have happened before the adjournment of some term of the court the proceeding can be sustained on the ground that the county court is always open. It was, indeed, always open within the meaning of law, but only for the transaction of business which may be done without notice. Where due process of law is required, however, as in cases of taking the property of heirs, the citation must be constructed and made returnable with reference to a term of court to be mentioned therein, which must be one occurring after the lapse of ten days subsequent to the completion of service. The paper relied upon is not a citation within the meaning of the law because of the failure to designate the proper or any term of court at which cause was to be shown against the sale. The proceedings based thereon are void upon their face, and hence may be attacked in this collateral litigation to quiet title. For these reasons I am unable to concur with the argument of Mr. Justice Moore.

BEAN, J. (dissenting):

The order of sale made by the county court was made without jurisdiction and void. It should not be given any force.

88 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of March 1917,

On this Tuesday the 27th day of March 1917 the same being the 13th judicial day of said term, there were present:

Thomas A. McBride, Chief Justice,
Henry J. Bean, Associate Justice,
Henry L. Benson, Associate Justice,
Lawrence T. Harris, Associate Justice,
Frank A. Moore, Associate Justice,
George H. Burnett, Associate Justice,
Wallace McCamant, Associate Justice,
J. C. Moreland, Clerk,

whereupon, among others, the following proceedings were had:

In the Matter of the Petitions for Rehearing Heretofore Filed in STATE v. MORRIS and Four Other Causes Pending.

Now at this time it is ordered by the court that the petitions for rehearing heretofore filed in the following cases be and the same are in all respects denied:

State v. Morris;
Roth v. Troutdale Land Co.;
Ulbrand v. Bennett;
Provoost v. Cone; and
Stadelman v. Miner.

89 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of said court, do hereby certify that the foregoing pages numbered 1 to 88 inclusive, are a true, full and complete transcript of the record and proceedings as stipulated for by the parties hereto, in the case of Minnie Evvia Stadelman et al., plaintiffs vs. W. H. Miner and Charles Worden, defendants, and also of the opinion of the court rendered therein and the decree based thereon, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salem, Oregon, this 10th day of August 1917.

[Seal Supreme Court, State of Oregon. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

90 *Assignment of Errors.*

In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents & Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants & Defendants in Error.

Now come the plaintiffs in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the Writ of Error by which they seek to have reviewed the decree made by this Honorable Court on the 27th day of March, 1917.

I.

Introducing their first assignment of error, and for the information of the Court, these plaintiffs in error recite and say that said

Minnie Evvia Stadelman and Henry Hines Fletcher were and are the sole heirs at law of Charles W. Fletcher who died intestate in Coos County, Oregon, on or about the 27th day of January, 1897, leaving an estate situate in the State of Oregon consisting in part of the following mentioned and described real property, to-wit:

The N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26 S. of R. 11, W. of the Willamette Meridian, in Coos County, Oregon.

And that said John W. Motley, the other of these plaintiffs in error, has succeeded to an undivided one-half interest in the rights of said Minnie Evvia Stadelman and Henry Hines Fletcher, as such heirs of said Charles W. Fletcher, deceased.

That the said heirs of Charles W. Fletcher, deceased, at the time of his said death, were residents and inhabitants of the State of Missouri and resided therein continuously from a time prior to the said death of their said ancestor until the year 1913.

91 That on the 14th day of April, 1897, one John F. Hall was appointed administrator of the estate of said Charles W. Fletcher, deceased, and on the 6th day of June, 1902, the County Court of the State of Oregon for Coos County made an order directing all persons interested in said estate to appear on the 16th day of July, 1902, to show cause, if any, why the said administrator should not be directed to sell the said real property of the said estate as above described.

That pursuant to said order, a citation was issued on June 9, 1902, directing the heirs at law of said Charles W. Fletcher and all persons interested in said estate to appear on July 16, 1902, at the court house, Coquille City, Coos County, Oregon, to show cause, if any exist, why an order of sale of said real property should not be made.

That at the time said order was made and at the time said citation was issued, and at all times while said estate was being administered upon, the laws of the State of Oregon required that a citation to show cause on application by an administrator to sell real property should require the devisees and heirs therein mentioned, and all others unknown, to appear at a term of court therein mentioned not less than ten days after service of such citation to show cause, if any exist, why an order of sale should not be made as in the petition prayed for.

That the citation or pretended citation issued and directed to the said heirs of Charles W. Fletcher, deceased, did not mention any term of court, and said citation or pretended citation required the persons to whom it was directed to appear within two days after the publication, or service thereof was completed, to-wit, required them to appear on July 16, 1902, whereas the last day necessary to complete the publication of said citation was July 15, 1902, while

92 under the laws of the State of Oregon said heirs could not lawfully have been required to appear pursuant to a citation so published, at any date earlier than July 25, 1902, it being required by the laws of the State of Oregon during all of the times hereinbefore mentioned and referred to that the citation in such case should be served and returned as a summons, and upon an heir or devisee

unknown or non-resident that it should be served by publication in a newspaper not less than four weeks. That the first publication of the citation or pretended citation to the heirs at law of said Charles W. Fletcher, deceased, was made on the 17th day of June, 1902, and the last publication on the 15th day of July of said year.

That during all of the times herein mentioned and from a long time prior to the death of said Charles W. Fletcher, deceased, up to the present time, under the laws of the State of Oregon, a proceeding for the sale of real property by the administrator of a deceased person in the course of his duties as such administrator, was not and is not a proceeding in rem but was and is a proceeding in personam; and it is, and during all of the times herein mentioned, was, the law of the State of Oregon that unless the probate court has secured jurisdiction of the persons of the heirs, as well as the subject matter, the sale is void.

That on the 17th day of July, 1902, the time being eight days shorter than the time required by law to be given the non-resident heirs within which to appear, the said County Court of the State of Oregon for Coos County made an order directing the sale of said real property, and a pretended sale thereof was made on the 20th day of January, 1903, to one August Nelson, and the defendants claim such title or pretended title as they have by mesne conveyances from said August Nelson and his grantees.

And plaintiffs in error say that during all of said time from
93 the death of said Charles W. Fletcher on the 27th day of January, 1897, until the said 20th day of January, 1903, and long subsequent thereto, the said heirs of Charles W. Fletcher, deceased, to-wit, Minnie Evvia Stadelman and Henry Hines Fletcher, were non-residents of the State of Oregon, being residents and inhabitants of the State of Missouri; and that they never received any notice of said sale or of the application of the administrator for an order authorizing the sale of said real property; and that no notice of said sale or of said application as required by the law of the State of Oregon was ever served upon them or either of them.

That under the statute law of the State of Oregon in force on said 27th day of January, 1897, and from that time forward up to and including the present time, the real property of any deceased person descends directly to his devisees or heirs at law and the ~~little~~ title thereto vests in them immediately upon the death of the owner of such real property; so that from and after the 27th day of January, 1897, said Minnie Evvia Stadelman and Henry Hines Fletcher became and were the owners in fee simple of the real property hereinbefore in this assignment of error mentioned and described and their title thereto could not be divested except by the method and means provided by the statute law of the State of Oregon or of the United States.

And these plaintiffs in error say that such title or pretended title as defendants claim to said property is based entirely upon the sale or pretended sale made by said administrator upon said defective or pretended service of citation or pretended citation in the said proceedings for the administration of the estate of said Charles W.

Fletcher, deceased; and that defendants have no other title whatsoever in or to the said real property.

And plaintiffs in error say that the Supreme Court of the
94 State of Oregon, by its decision made on the 27th day of March, 1917, adjudged and decreed that the said defendants obtained title to said real property above described by said sale upon said defective or pretended service of said citation or pretended citation, and adjudged and decreed that the defendants were the owners of said real property, and divested the plaintiffs, these plaintiffs in error, of their title thereto.

And these plaintiffs in error say that in so adjudging and decreeing, the Supreme Court of the State of Oregon erred and deprived these plaintiffs in error of their property, to-wit, the real property above described, without due process of law.

II.

That the Supreme Court of the State of Oregon erred in holding that the heirs of Charles W. Fletcher, deceased, received any notice of the application of the administrator to sell the real property described in the complaint.

III.

That said court erred in holding that the so-called "citation" referred to in paragraph lettered "*c*" of subdivision numbered "7" of plaintiffs' amended complaint, and which is included as an exhibit in the record of this case in the Circuit Court (Plaintiffs' Exhibit "DP"), constituted any notice, either actual or constructive, of the application of the administrator for a license, or order of sale of real property in said estate matter.

IV.

That said court erred in failing to hold and determine, as a matter of law, that the Order for Citation referred to in paragraph lettered "*d*" of subdivision numbered "7" of plaintiffs' amended complaint (plaintiffs' exhibit "DO" in the evidence) was beyond the powers of the court purporting to make the same, was without authority of law, and was void; and erred in failing to hold, as a matter of law,
95 that any citation, of whatever form or substance, issued pursuant to said order, would have been void because wholly unauthorized, and erred in failing to hold and determine, as a matter of law, that the citation or pretended citation issued pursuant to said order was void and that the publication thereof carried to the said owners of said real property no notice, either actual or constructive, of the proposed sale thereof.

V.

That said court erred in failing to hold and determine in this suit that the sale or pretended sale of the real property of the estate of

Charles W. Fletcher, deceased, by the administrator, was an attempt to take the property of the heirs of said deceased without due process of law.

VI.

That said court erred in rendering the decision made by it in this suit, in that the effect of said decision, if permitted to stand, is to deprive the plaintiffs of their property without due process of law, thereby denying to said plaintiffs a right and an immunity growing out of the Constitution of the United States.

VII.

That the said Supreme Court of the State of Oregon made and caused to be entered the said decree and judgment on the said 27th day of March, 1917, in violation of the said right to due process of law reserved to the said heirs of Charles W. Fletcher, deceased, so making and causing the same to be entered notwithstanding the fact that these plaintiffs, the plaintiffs in error herein, had raised the said constitutional question in the presentation and trial of said cause in said court, and had, by their printed brief filed in said Supreme Court of the State of Oregon specifically expressed reliance
96 upon Section 1 of Article XIV of the Amendments to the Constitution of the United States, quoting the same hæc verba in said brief.

Wherefore, these plaintiffs in error, the plaintiffs in the above-entitled suit, pray that said decree be reversed and that said Supreme Court of the State of Oregon be ordered to enter a decree affirming the decree of the Circuit Court of the State of Oregon for Coos County in so far as the same decrees the plaintiffs in the suit to be the owners of the real property described in the complaint; and that such further proceedings may be had in said Supreme Court of the State of Oregon as may be proper and not inconsistent with the decision rendered in the Supreme Court of the United States.

JNO. M. GEARIN,
By H. G. HOY,
JOHN M. GEARIN,
HARRY G. HOY,
Attorneys for Plaintiffs in Error.

97 STATE OF OREGON,
County of Coos, ss:

Due and legal service and notice of the within Assignment of Errors by mailing of a true copy thereof to Guy C. H. Corliss, Esq., Portland, Ore., is hereby certified to this 21st day of June, 1917.

HARRY G. HOY,
Of Attorneys for Plaintiffs in Error.

Service of the within assignment of errors is hereby admitted this 21st day of June, 1917.

GUY C. H. CORLISS,
Attorney for Defendants in Error.

F. B. WAITE.

F. B. WAITE.

[Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman et al., Plaintiffs in Error, vs. W. H. Miner et al., Defendants in Error. *Defendants.* Assignment of Errors. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy, Marshfield, Oregon, Attorney for Plaintiffs in Error.

98 *Petition for Appeal or Prosecution of Writ of Error.*

In the Supreme Court of the State of Oregon.

In Equity.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants.

To the Honorable Thomas A. McBride, Chief Justice of the Supreme Court of the State of Oregon and to the Associate Justices of the Court:

Minnie Evvia Stadelman, Henry Hines Fletcher, and John W. Motley, the plaintiffs in the above-entitled cause, show by this petition to this Honorable Court, that in the records, proceedings, and decisions in said court, the same being the highest court of said State of Oregon in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said above-named plaintiffs.

That, as appears in the records and proceedings, there was drawn in question the violation of a right, privilege, and immunity claimed by these said plaintiffs under the Constitution of the United States, and the decision was against said right, and against said privilege, and against said immunity so guaranteed to said plaintiffs by the said Constitution, all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, Petitioners pray that a writ of error be allowed, and that a transcript of record, proceedings, and papers upon which the said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such court in such cases made and provided, and that

the same may be by said Honorable Court inspected and corrected in accordance with law and justice.

JNO. M. GEARIN,
By H. G. HOY,
JOHN M. GEARIN,
HARRY G. HOY,
Attorney- for Plaintiffs.

99 STATE OF OREGON,
County of Coos, ss:

Due and legal service and notice of the within Petition by mailing of a true copy thereof to Guy C. H. Corliss, Atty. for Dfdts., Portland, Ore., is hereby certified to this 21st day of June, 1917.

HARRY G. HOY,
Of Attorneys for Plaintiffs in Error.

Service of the within petition is hereby admitted this 21st day of June, 1917.

GUY C. H. CORLISS,
Attorney for Defts. in Error.

[Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman et al., Plaintiffs in Error, vs. W. H. Miner et al., Defendants in Error *Defendants.* Petition for Writ of Error. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy, Marshfield, Oregon, Attorney for Petitioners.

100 *Bond.*

In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants.

Know all men by these presents that we, Minnie Evvia Stadelman, Henry Hines Fletcher, and John W. Motley, plaintiffs in error in the above entitled cause on writ of error to the Supreme Court of the United States, as principals, and Dennis McCarthy, of Marshfield, Coos County, Oregon, as surety, are held and firmly bound unto W. H. Miner and Charles Worden defendants and appellants in the Supreme Court of the State of Oregon, and defendants in error on the writ of error to the Supreme Court of the United States, in the sum of Five Hundred ($500) Dollars, lawful money of the United States, to be paid to the said W. H. Miner and Charles Worden and their respective executors, administrators, and successors, to which payment well and truly to be made we bind our-

selves and each of us jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 22nd day of June, 1917.

Whereas, the above named Minnie Evvia Stadelman, Henry Hines Fletcher and John W. Motley are prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Oregon in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Minnie Evvia Stadelman, Henry Hines Fletcher and John W. Motley shall prosecute their said appeal or writ of error to effect and answer all costs if they fail to make good
101 their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

MINNIE EVVIA STADELMAN, [SEAL.]
HENRY HINES FLETCHER, [SEAL.]
JOHN W. MOTLEY, [SEAL.]
By HARRY G. HOY, *Their Attorney.*
DENNIS McCARTHY, *Surety.* [SEAL.]

STATE OF OREGON,
County of Coos, ss:

I, Dennis McCarthy, being first duly sworn, say that I am the person described in and who executed the foregoing bond as surety thereto; that I am neither an attorney nor counselor at law, sheriff, clerk of any court, or other officer of any court; that I am a resident householder and freeholder of said County of Coos, State of Oregon, and that I am worth the sum of $2000.00 over and above all my just debts and legal liabilities and exclusive of property exempt from execution.

DENNIS McCARTHY.

Subscribed and sworn to before me this 22nd day of June, 1917.
[NOTARIAL SEAL.] W. J. CONRAD,
Notary Public for Oregon.

My commission expires March 21, 1920.

The within and foregoing bond is approved both as to sufficiency and form this 25th day of June, 1917.

THOMAS A. McBRIDE,
Chief Justice of the Supreme Court of the State of Oregon.

STATE OF OREGON,
County of Coos, ss:

Due and legal service and notice of the within Bond by mailing a true copy thereof to Guy C. H. Corliss, Esq., Portland, Ore., is hereby certified to this 22nd day of June, 1917.

HARRY G. HOY,
Attorney for Pltff. in Error.

102 Service of the within is hereby admitted this 21st day of June 1917.

GUY C. H. CORLISS,
Attorney for Pltff. in Error.

(Endorsed:) In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman et al., Plaintiffs in Error, vs. W. H. Miner et al., Defendants in Error. Bond. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy, Marshfield, Oregon, Attorney for Pltffs. in Error.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oregon, Greeting:

Whereas in the records and the proceedings and in the rendition of the judgment in the certain cause which is now before you or some of you between Minnie Evvia Stadelman, Henry Hines Fletcher, and John W. Motley, plaintiffs, and W. H. Miner and Charles Worden, Defendants, your court being the highest court of said state having jurisdiction of the cause, there was drawn in question the violation of a right, privilege, or immunity claimed by the plaintiffs under the Constitution of the United States, and the decision was against the validity of said claim of said plaintiffs so that they were denied the said right, or privilege, or immunity so claimed by them by virtue of the said Constitution of the United States; and whereas there is manifest error in said decision to the damage of Minnie Evvia Stadelman, Henry Hines Fletcher, and John W. Motley, the petitioners in error; and whereas we are willing that if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court, the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington within sixty (60) days from the date hereof, to the end that the record may be then and there inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 27th day of June, 1917. Done in the City of Portland, Oregon, with the seal of the District Court of the United States for the District of Oregon
104 attached.

[Seal United States District Court, Oregon.]

G. H. MARSH,
Clerk of the United States District Court
for the District of Oregon.

Indorsement of Allowance.

The foregoing Writ of Error allowed upon plaintiffs giving bond in the sum of Five Hundred Dollars ($—) according to law.

THOMAS A. McBRIDE,
Chief Justice of the Supreme Court of the State of Oregon.

Service of the within writ of error is hereby admitted this 27th day of June, 1917.

GUY C. H. CORLISS,
Attorney for Def'ts in Error.

105 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman, et al., Plaintiffs and Respondents & Plaintiffs in Error, vs. W. H. Miner and Charles Worden, Defendants and Appellants & Defendants in Error. Writ of Error. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy, Dolph, Mallory, Simon & Gearin, Portland, Oregon, Attorneys for Plaintiffs in Error.

106 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of said court do hereby certify that there was lodged with me as such clerk on June 29, 1917, in the matter of Minnie Evvia Stadelman et al. plaintiffs vs. W. H. Miner and Charles Worden, defendants:

1. The original bond of which a copy is herein set forth.
2. The Writ of Error, the original of which is attached hereto.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salem, Oregon, this 10th day of August, 1917.

[Seal Supreme Court, State of Oregon. 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

107 In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents and Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants and Defendants in Error.

I, Thomas A. McBride, Chief Justice of the Supreme Court of the State of Oregon, do hereby certify that upon the trial of the above

entitled suit in the Supreme Court of the State of Oregon, the Plaintiffs and Respondents in said suit claimed and asserted that the Decree asked for by the Defendants and Appellants, to wit, a Decree affirming the decision of the Circuit Court of the State of Oregon for Coos County, would deprive Plaintiffs and Respondents of their property without due process of law, and Plaintiffs and Respondents in their briefs cited this Court to the 14th Amendment of the Constitution of the United States, wherein it is provided "nor shall any State deprive any person of life, liberty or property without due process of law," and Plaintiffs and Respondents in their oral argument before this Court relied upon said 14th Amendment to the Constitution in support of their said contention. I further certify that the Supreme Court of the State of Oregon in the decision of this case considered said claim of Plaintiffs and Respondents and considered said 14th Amendment to the Constitution of the United States in its application to the facts involved in this suit and decided against the said claim of the Plaintiffs and Respondents.

And I further certify that the Decree of the Circuit Court of the State of Oregon for Coos County enteres in accordance with the Mandate of this Court upon the final Decree of this Court of March 27, 1917, was entered in the lower Court, to wit, the Circuit Court of the State of Oregon for Coos County, on April 20th, 1917.

THOMAS A. McBRIDE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

108 The Court hereby orders that the foregoing Certificate of the Chief Justice be made a part of the record in the above entitled suit, and that the same be transmitted as a part of that record by the Clerk of this Court to the Supreme Court of the United States, together with the Writ of Error in the above entitled suit.

Dated June —, 1917.

——— ———,
Chief Justice of the Supreme Court of the State of Oregon.

109 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvia Stadelman et al., Plaintiffs and Respondents & Plaintiffs in Error, vs. W. H. Miner and Charles Worden, Defendants and Appellants, Defendants in Error. Certificate of Court. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy, Dolph, Mallory, Simon & Gearin, Portland, Oregon, Attorneys for Plaintiffs in Error.

IN CENTER

110 In the Supreme Court of the State of Oregon.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER, and JOHN W. MOTLEY, Plaintiffs and Respondents, and Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN, Defendants and Appellants and Defendants in Error.

To W. H. Miner and Charles Worden and to C. H. Corliss, their Attorney:

Whereas, Minnie Evvia Stadelman, Henry Hines Fletcher and John W. Motley, Plaintiffs in Error, have lately obtained a Writ of Error to the Supreme Court of the United States from a Decree rendered in the Supreme Court of the State of Oregon in your favor, and have given the security required by law,

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, within Sixty days from the date thereof, pursuant to said Writ of Error, wherein said Minnie Evvia Stadelman, Henry Hines Fletcher and John W. Motley are Plaintiffs in Error, and you are Defendants in Error, to show cause, if any there be, why the Decree rendered against the said Plaintiffs in Error as in said Writ mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness, the Honorable Thos. A. McBride, Chief Justice of the Supreme Court of the State of Oregon, this 27th day of June, A. D. 1917.

THOMAS A. McBRIDE.

Due and legal service of the within Citation is hereby admitted and accepted at Portland, Oregon, this 27th day of June, A. D. 1917.

GUY C. H. CORLISS,
Attorney for Defendants in Error.

111 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Minnie Evvie Stadelman, et al., Plaintiffs and Respondents, Plaintiffs in Error, vs. W. H. Miner and Charles Worden, Defendants and Appellants, Defendants in Error. Citation. Filed June 29, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Harry G. Hoy and Dolph, Mallory, Simon & Gearin, Portland, Oregon, Attorneys for Plaintiffs in Error.

112 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oregon, in the City of Salem, this 10th day of August, 1917.

[Seal Supreme Court, State of Oregon. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

Cost of transcript $28.00 paid by H. G. Hoy, attorney for plaintiffs in error.

J. C. MORELAND, *Clerk.*

Endorsed on cover: File No. 26111. Oregon Supreme Court. Term No. 644. Minnie Evvia Stadelman, Henry Hines Fletcher, and John W. Motley, plaintiffs in error, vs. W. H. Miner and Charles Worden. Filed August 24th, 1917. File No. 26111.

DEC 28 1917
JAMES D. MAHER
Clerk

REPLY BRIEF OF PLAINTIFFS IN ERROR.

(20,111)

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 544.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon

JOHN M. GEARIN, Portland, Oregon,
HARRY G. HOY, Spokane, Washington,
Attorneys for Plaintiffs in Error.

GUY C. H. CORLISS, Portland, Oregon,
Attorney for Defendants in Error.

(26,111)

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 644.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon

REPLY BRIEF OF PLAINTIFFS IN ERROR.

With the express consent of counsel for the defendants in error, and to the end that the court may obtain a clear understanding of the issues

between the parties in this proceeding, we respectfully submit for the consideration of the court the following reply to the brief of defendants in error.

Where counsel says, "It is undisputed that it was necessary to sell this land for the payment of debts and expenses of administration, and that the land was sold for its full value," etc. (see p. 3, defendants' brief), we must take issue with him, and call attention to paragraph lettered "a" of subdivision numbered 7 of the complaint in this suit (see p. 4, Printed Transcript), where it is expressly alleged that the sale was not necessary and is even claimed that this fact appears upon the face of the record. And we respectfully submit to this court that even at this late date, with the honesty of the administrator and the regularity of the conduct of that administration supported by the strong presumptions afforded by the Oregon statutes, there is still much room for a difference of opinion on that question. Then, at the time the sale was petitioned for, was the time that this question should have been contested. And it is this fact that emphasizes the necessity for the giving of the full and proper notice to those heirs, because under the laws of the State of Oregon they were *"adversary and necessary parties"* (see

Fiske v. Kellogg, 3 Or. 507; *Stadelman v. Miner*, 83 Or. 364-5).

We also take issue with the statement that "When the owner of real estate dies, the right to inherit such property is a *privilege* created by statute law"; but we rest confident that we have shown by our initial brief in this court and cause that under the common law the real estate of any deceased person descended directly to his heirs, and that it could not be subjected to the payment of the simple contract debts of the deceased. So, it will be observed that the statutes, instead of granting a *privilege* have cast a *burden* upon the heir in connection with the enjoyment of his inheritance, as fully pointed out by us in our former brief.

We may gracefully grant that the legislature might, if it saw fit, convert the proceeding for the sale of real property by an administrator into a proceeding *in rem* and "wholly dispense with notice to the heirs." But this does not weaken the position of the plaintiffs in error in this case. The fact remains that *the legislature of the State of Oregon has not done so.* In Oregon the proceeding is one *in personam.* The heir "*is an adversary*

and necessary party." The administrator in such case is "the moving party in behalf of the creditors"; and the heir "has a right to contest his allegations" and show that no necessity for the sale of the real property exists. (See *Fiske v. Kellogg* and *Stadelman v. Miner, supra.*)

The legislature having determined that, in Oregon, this proceeding shall be one *in personam* and having prescribed the form of citation that shall be used for citing the heir to appear, and having further prescribed the length of time which shall be granted the heir within which to appear and contest the allegations of the petition, no court has authority to curtail that notice, either as to form and contents or as to the term found appropriate by the legislature to be given the heir within which to appear. If the court could emasculate the citation as to form and contents as the Oregon Supreme Court has sought to do in this case; or could shorten the time from ten to one or two days, as said court has here attempted to do, then we should have to admit that it is within the power of the courts to legislate this proceeding entirely into a proceeding *in rem*, directly against the expressed will and wish of the sovereign people of Oregon. The contention is monstrous! The plain provisions of the statute define the *due process of*

law to which the heir to real property in the State of Oregon is entitled; and the duty of this court, under the provisions of the constitutional right and immunity relied upon by these plaintiffs, is indeed plain.

With reference to the specious argument that this is a case where the Oregon Court has construed a statute and found certain provisions thereof directory only instead of mandatory, we have only to call attention to the fact that such a holding, as indicated above, enables the courts to disregard the evident will of the people, to transform every proceeding *in personam* into a proceeding *in rem,* and deny to every citizen, in all civil actions, the right to the notice secured to him by the sovereign people by legislative enactment—in other words, deny to him "due process of law" in each such given case.

In closing we direct the attention of the court to the case of *Wilkinson v. Leland,* 2 Peters, 657, cited on page 14 of defendants' brief. The decision in that case has resulted in much confusion in the courts and is the basic support of every decision that is relied upon by counsel for the defendants in error in this case. The most pertinent

comment that we could direct to that case is to be found in the following quotation from the first decision of Justice McBride in the case of *Stadelman v. Miner,* 83 Or. 369. After quoting at some length from said decision, Justice McBride comments as follows:

> "We cite this excerpt to show how inapplicable the case of Wilkinson v. Leland is to a case arising under our constitution. There was a case occurring where there was no constitution, no separation of the legislative and judicial powers, no restraint upon legislation, except those which the court might assume were the necessary restrictions of a republican form of government. Here we have the fourteenth amendment prescribing that no state shall deprive any person of his property without due process of law. We have in our state constitution a separation of the executive, legislative, and judicial power and a prohibition against officers of one of these departments exercising the power of any other. We have a constitutional provision giving to the county court the powers incident to probate courts, and in addition to this we have general laws prescribing the procedure of these courts and specifying just what shall give them authority to divest the heir of an estate of his property in favor of the claims of creditors. If all these wise restrictions, which Rhode Island has now adopted, and which the national government has found necessary to sup-

plement by the fourteenth amendment, are to be disregarded it would be just as well to repeal all restrictions upon encroachments on the right to hold and enjoy property."

We also call attention to the fact that this first decision of the Oregon Supreme Court in this case of *Stadelman v. Miner* expressly overruled the decision of the court in the case of *Mitchell v. Campbell,* 19 Or. 198-200-210, cited by counsel for the defendants in error at p. 27, and by him quoted at p. 33 of his brief. (See 83 Or. Rep., p. 373.)

It is true that this first decision of the Oregon Court in this case of *Stadelman v. Miner* reached a different result from that announced by the court in its final decision; but it will be noticed that it was not overruled in any respect, and that Justice Moore in the opening statement of his later opinion (see 83 Or. 383) practically adopts the opinion of Justice McBride as the law of the State, but calls attention to the fact that the petition for rehearing raised a new question, upon which the new decision of the court is made to turn. The decision of Justice McBride rendered in the first instance was pertinent to the facts of the case as then pre-

sented to this court, was well considered and brilliantly rendered; and it is a part of the judicial law of the State of Oregon of which we are justly proud.

The judgment of the Supreme Court of Oregon should be reversed and the case remanded for such further proceedings as said court may then find proper.

Respectfully submitted,

HARRY G. HOY,

JOHN M. GEARIN,

Attorneys for Plaintiffs in Error.

ADDENDUM.

In support of the contentions maintained by plaintiffs in error in their briefs in this Court we deem it proper and advisable to call attention to decisions of this Court involving the same or similar questions to those here involved.

The attitude of this Court as to the strictness

with which statutory provisions relating to service of notice on non-resident parties must be followed in order to vest the Court with jurisdiction, is evidenced by the decision in the case of *Guaranty Trust & Safe Deposit Co. v. Green Cove & M. R. Co.,* 139 U. S. 137-151, 35 L. Ed. 117-120. It is perfectly apparent that if the Court does not make a complete departure from the doctrine announced in said case and the long list of prior decisions therein cited, and does not absolutely renounce the prnciples upon which it decided the case of *Windsor v. McVeigh,* 23 Law Ed. 915-7, it must, if it assumes jursdiction at all, hold the administrator's sale under whch the defendants in this suit are claiming wholly void. And that the Court will exercise jurisdiction is just as evident from an examination of the decision in the case of *Grannis v. Ordean,* 58 Law Ed. 1365-1370. In this latter case the Court was called upon to decide whether a slight defect in the spelling of the defendant's name in a published summons was such a substantial departure from the requirements of the Minnesota statute relative to service of summons on non-residents as to constitute a violaton of the defendant's constitutonal right to *due process of law.* This Honorable Court met the question directly, saying:

> "The underlying question is a practical one—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned."

We cheerfully submit to the same test in this case, namely, "*Does the citation to the heirs as published* (there was no mailing, and no actual knowledge carried to the heirs) *constitute a substantial compliance with the Oregon statute and sufficient constructive notice to the parties concerned?*"

The statutes of Oregon required that the citation should issue to the heirs directing them "to appear at a *term of court* THEREIN MENTIONED, *not less than ten days after the service of such citation*" to contest the allegations of the petition for the sale of their property. The citation here complained of *did not mention any term of court;* and it directed the heirs to appear *within two days after the service thereof* instead of *ten days;* and the order of sale was actually made more than a week earlier than it could lawfully have been made pursuant to the proper service of a citation made in conformity with the re-

quirements of the statute. *A substantal compliance with the statute?* It appeals to us as a flagrant disregard of the plain requirements of the statute and a wanton violation of the rights of these *"adversary and necessary parties."*

Respectfully submitted,

HARRY G. HOY,

JOHN M. GEARIN,

Attorneys for Plaintiffs in Error.

DEC 21 1917
JAMES D. MAHER,
Clerk.

Brief - Pltffs in Error

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 644

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon.

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Supreme Court of the United States

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vs

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon.

ABSTRACT, OR STATEMENT OF THE CASE.

This is a suit brought by the plaintiffs in error against defendants in error, the object thereof being to remove a cloud or clouds from the title to real property. The case was commenced in the Circuit Court of the State of Oregon for Coos County. The plaintiffs in error in this Court were the plaintiffs in the original suit. As the sole heirs of one Charles W. Fletcher, deceased, they seek to have an administrator's sale of their ancestor's property declared void

The N. E. quarter of the N. E. quarter; the W. half of the N. E. quarter, and the N. W. quarter of the S. E. quarter of Section 21, Township 26 S. of R. 11, W. of the Willamette Meridian, in Coos County, Oregon.

And that said John W. Motley, the other of these plaintiffs in error, has succeeded to an undivided one-half interest in the rights of said Minnie Evvia Stadelman and Henry Hines Fletcher, as such heirs of said Charles W. Fletcher, deceased.

That the said heirs of Charles W. Fletcher, deceased, at the time of his said death, were residents and inhabitants of the State of Missouri and resided therein continuously from a time prior to the said death of their ancestor until the year 1913.

That on the 14th day of April, 1897, one John F. Hall was appointed administrator of the estate of said Charles W. Fletcher, deceased, and on the 6th day of June, 1902, the County Court of the State of Oregon for Coos County made an order directing all persons interested in said estate to appear on the 16th day of July, 1902, to show cause, if any, why the said administrator should not be directed to sell the said

real property of the said estate as above described.

That pursuant to said order, a citation was issued on June 9, 1902, directing the heirs at law of said Charles W. Fletcher and all persons interested in said estate to appear on July 16, 1902, at the court house, Coquille City, Coos County, Oregon, to show cause, if any exist, why an order of sale of said real property should not be made.

That at the time said order was made and at the time said citation was issued, and at all times while said estate was being administered upon, the laws of the State of Oregon required that a citation to show cause on application by an administrator to sell real property should require the devisees and heirs therein mentioned, and all others unknown, to appear at a term of court therein mentioned not less than ten days after service of such citation to show cause, if any exist, why an order of sale should not be made as in the petition prayed for.

That the citation or pretended citation issued and directed to the said heirs of Charles W. Fletcher, deceased, did not mention any term of court, and said citation or pretended citation required the persons to

whom it was directed to appear within two days after the publication, or service thereof was completed, to-wit, required them to appear on July 16, 1902, whereas the last day necessary to complete the publication of said citation was July 15, 1902, while under the laws of the State of Oregon said heirs could not lawfully have been required to appear pursuant to a citation so published, at any date earlier than July 25, 1902, it being required by the laws of the State of Oregon during all of the times hereinbefore mentioned and referred to that the citation in such case should be served and returned as a summons, and upon an heir or devisee unknown or non-resident that it should be served by publication in a newspaper not less than four weeks. That the first publication of the citation or pretended citation to the heirs at law of said Charles W. Fletcher, deceased, was made on the 17th day of June, 1902, and the last publication on the 15th day of July of said year.

That during all of the times herein mentioned and from a long time prior to the death of said Charles W. Fletcher, deceased, up to the present time, under the laws of the State of Oregon, a proceeding for

the sale of real property by the administrator of a deceased person in the course of his duties as such administrator, was not and is not a proceeding in rem but was and is a proceeding in personam; and it is, and during all of the times herein mentioned, was, the law of the State of Oregon that unless the probate court has secured jurisdiction of the persons of the heirs, as well as the subject matter, the sale is void.

That on the 17th day of July, 1902, the time being eight days shorter than the time required by law to be given the non-resident heirs within which to appear, the said County Court of the State of Oregon for Coos County made an order directing the sale of said real property, and a pretended sale thereof was made on the 20th day of January, 1903, to one August Nelson, and the defendants claim such title or pretended title as they have by mesne conveyances from said August Nelson and his grantees.

And plaintiffs in error say that during all of said time from the death of said Charles W. Fletcher on the 27th day of January, 1897, until the said 20th day of January, 1903, and long subsequent thereto, the said heirs of Charles W. Fletcher, deceased, to-

wit, Minnie Evvia Stadelman and Henry Hines Fletcher, were non-residents of the State of Oregon, being residents and inhabitants of the State of Missouri; and that they never received any notice of said sale or of the application of the administrator for an order authorizing the sale of said real property; and that no notice of said sale or of said application as required by the law of the State of Oregon was ever served upon them or either of them.

That under the statute law of the State of Oregon in force on said 27th day of January, 1897, and from that time forward up to and including the present time, the real property of any deceased person descends directly to his devisees or heirs at law and the title thereto vests in them immediately upon the death of the owner of such real property; so that from and after the 27th day of January, 1897, said Minnie Evvia Stadelman and Henry Hines Fletcher became and were the owners in fee simple of the real property hereinbefore in this assignment of error mentioned and described and their title thereto could not be divested except by the method and means provided by the statute law of the State of Oregon or of the United States.

And these plaintiffs in error say that such title or pretended title as defendants claim to said property is based entirely upon the sale or pretended sale made by said administrator upon said defective or pretended service of citation or pretended citation in the said proceedings for the administration of the estate of said Charles W. Fletcher, deceased; and that defendants have no other title whatsoever in or to the said real property.

And plaintiffs in error say that the Supreme Court of the State of Oregon, by its decision made on the 27th day of March, 1917, adjudged and decreed that the said defendants obtained title to said real property above described by said sale upon said defective or pretended service of said citation or pretended citation, and adjudged and decreed that the defendants were the owners of said real property, and divested the plaintiffs, these plaintiffs in error, of their title thereto.

And these plaintiffs in error say that in so adjudging and decreeing, the Supreme Court of the State of Oregon erred and deprived these plaintiffs in error of

their property, to-wit, the real property above described, without due process of law.

II.

That the Supreme Court of the State of Oregon erred in holding that the heirs of Charles W. Fletcher, deceased, received any notice of the application of the administrator to sell the real property described in the complaint.

III.

That said court erred in holding that the so-called "citation" referred to in paragraph lettered *"c"* of subdivision numbered "7" of plaintiffs' amended complaint, and which is included as an exhibit in the record of this case in the Circuit Court (Plaintiffs' Exhibit "DP"), constituted any notice, either actual or constructive, of the application of the administrator for a license, or order of sale of real property in said estate matter.

IV.

That said court erred in failing to hold and determine, as a matter of law, that the Order for Cita-

tion referred to in paragraph lettered *"d"* of subdivision numbered "7" of plaintiffs' amended complaint (Plaintiffs' Exhibit "DO" in the evidence) was beyond the powers of the court purporting to make the same, was without authority of law, and was void; and erred in failing to hold, as a matter of law, that any citation, of whatever form or substance, issued pursuant to said order, would have been void because wholly unauthorized, and erred in failing to hold and determine, as a matter of law, that the citation or pretended citation issued pursuant to said order was void and that the publication thereof carried to the said owners of said real property no notice, either actual or constructive, of the proposed sale thereof.

V.

That said court erred in failing to hold and determine in this suit that the sale or pretended sale of the real property of the estate of Charles W. Fletcher, deceased, by the administrator, was an attempt to take the property of the heirs of said deceased without due process of law.

VI.

That said court erred in rendering the decision made by it in this suit, in that the effect of said decision, if permitted to stand, is to deprive the plaintiffs of their property without due process of law, thereby denying to said plaitniffs a right and an immunity growing out of the Constitution of the United States.

VII.

That the said Supreme Court of the State of Oregon made and caused to be entered the said decree and judgment on the said 27th day of March, 1917, in violation of the said right to due process of law reserved to the said heirs of Charles W. Fletcher, deceased, so making and causing the same to be entered notwithstanding the fact that these plaintiffs, the plaitniffs in error herein, had raised the said constitutional question in the presentation and trial of said cause in said court, and had, by their printed brief filed in said Supreme Court of the State of Oregon specifically expressed reliance upon Section 1 of Article XIV of the Amendments to the Constitution of the United States, quoting the same hæc verba in said brief.

POINTS AND AUTHORITIES.

1. *Constitutional Immunity Invoked.* — No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, * * * *.

Sec. 1, Art. XIV, Amendments U. S. Const.

2. *Due Process of Law Defined.*—A prosecution or suit instituted and *conducted according to the prescribed forms and solemnities* for ascertaining guilt or *determining the title to property.*

An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights.

8 *Cyc.*, 1081-2.

3. *General Nature and Principles.*—The term "due process of law" is synonymous with "law of the land." * * * * It means certain fundamental rights, which our system of jurisprudence has always recognized. * * * * The term "due process of law," when applied to judicial proceedings, means that there must be a competent tribunal to pass on the subject-

matter; notice actual or constructive, an opportunity to appear and produce evidence, to be heard in person or by counsel; * * * * .

8 *Cyc.*, 1083-4.

4. The term "due process of law" when applied to judicial proceedings means, "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

Pennoyer v. Neff, 95 U. S., 714, 733; 24 L. Ed., 565.

5. To meet the requirements of the Constitution a suit or proceeding must pursue the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and, whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.

Hagar v. Reclamation Dist. etc., 111 U. S., 701; 28 L. Ed., 569.

6. At *common law* the real estate of which a de-

cedent dies seized descends or passes directly to his heir or devisee.

II *Am. & Eng. Enc.* (2nd Ed.), 1035.

7. Since at *common law* executors and administrators have no title to or interest in the real property of their decedents by virtue of their office, they can transfer none by sale, unless authorized by statute or by will of the deceased owner.

Id., 1040.

8. At *common law* the real property of a decedent could not be subjected to the payment of his simple contract debts, but it descended directly to his heirs who became liable for the debts by specialty or matters of record to the value of the inheritance, and in case of deficiency of personal property the creditors by simple contract lost their debts.

Id., 838.

9. RULE IN OREGON.—When any person shall die seized of any real property, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the

same, such real property shall descend subject to his debts as fellows:

In equal shares to his or her children.

Sec. 7348, *Lord's Oregon Laws.*

10. *Construction placed on Sec. 7348 L. O. L. by Oregon Court.*—An intestate having died, his real property descends immediately to his heirs at law who thereupon become vested, as tenants in common, with the legal title to the real estate of which he died seized.

Wheeler v. Taylor, 32 Or., 425; 67 Am. St. Rep., 540.

Noon Est., 49 Or., 286; 88 Pac., 678.

11. *Requisites of Citation to Heirs Issued on Petition for Order of Sale of Real Property.*—"Upon the filing of the petition a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court THEREIN MENTIONED, *not less than ten days after the service of such citation,* to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." (Sec. 1254, L. O. L.)

How Served on Non-resident.—" * * * * ; and upon an heir or devisee unknown or non-resident, it may be served by publication in a newspaper published in the county chosen by the administrator or executor, *not less than four weeks,* or for such further time as the court or judge may prescribe." (B. & C. Comp., Sec. 1175. This was the rule in Oregon from 1901 to 1907.)

12. *The Construction Placed on Sections Last Above Quoted.*—"The 4 weeks and 10 days thus limited means 38 days, to be computed by excluding the first day of publication of the citation and including the day upon which the order of sale of land is made. O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Horn v. United States Mining Co., 47 Or. 124, 81 Pac.

Stadelman v. Miner, page 33 Transcript of Record, this case.

Why the Statutes Relating to Sales by Administrators Must Be Strictly Followed and Complied With.

13. Proceedings for the sale of a decedent's real estate in Oregon are NOT proceedings *in rem;* and

unless the probate court has secured jurisdiction of the persons of the heirs as well as of the subject-matter, the sale will be void.

Fiske v. Kellogg, 3 Or., 504.

Smith v. Whiting, 55 Or., 393; 106 Pac., 794.

Brown v. Coleman, 62 Or., 455; 125 Pac., 278.

14. It is well settled in Oregon that, in the matter of the sale of a decedent's real property for the payment of debts, and in serving interested non-resident parties with notice by publication, the county court acts under a special statutory authority not according to the common law.

Smith v. Whiting, supra.

Wright v. Edwards, 10 Or., 298.

15. The rule is well settled that proceedings for the sale of real property of a decedent are statutory, and that such sale is VOID unless the requirements of the statute are complied with.

Hellman v. Merz, 44 Pac., 1080 (Calif.).

Hartley v. Groze, 37 N. W., 450 (Minn.).

Stilwell v. Swarthout, 81 N. Y., 113.

Bibson v. Roll, 80 Ill., 172.

Root v. McFerrin, 37 Miss., 17; 75 Am. Dec., 57.

16. While probate proceedings are at least *quasi* proceedings *in rem,* yet, where the statute provides for service upon persons, the same rule applies as in ordinary civil actions. The probate court, therefore, could have no jurisdiction to make an order of sale until the heirs had been given notice in accordance with the provisions of the statute.

Campbell v. Drais, 57 Pac., 995 (Calif.).

David v. Hudson, 11 N. W., 138.

17. A proceeding *in rem* by publication of notice, being a departure from the fundamental rule that no man can be condemned in his person or property without notice and an opportunity to make his defense, is to be subjected to a strict legal scrutiny. * * * * There must be a strict compliance with the forms of law prescribed by the legislature for the security of absent parties. * * * * If the requirements of the statute have not been strictly observed, * * * * proceeding of the court beyond its jurisdiction is void.

5 *Enc. U. S. Sup. Ct. Rep.,* 655.

AS TO FAILURE TO SHOW CLERK'S SEAL AFFIXED TO CITATION

18. "All process authorized by this code, to be issued by any court or officer thereof, shall run in the name of the State of Oregon, and be signed by the officer issuing the same; and if such process be issued by a clerk of a court, *he shall affix thereto his seal of office.*"

Lord's Oregon Laws, Sec. 1368.

19. A writ of attachment issued by the clerk of the Circuit Court of the State of Oregon is void unless such clerk affixes thereto his seal of office; and a sale of real property depending for its validity upon such attachment is a nullity.

Starkey v. Lunz, 57 Or., 148; 110 Pac., 703.

THE VOID SALE NOT CURED BY CURATIVE STATUTE.

20. In judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.

Cooley's Const. Limitations (5th Ed.), 473.

Brown v. Coleman, 125 Pac., 278 (Or.).

21. It is incompetent for the legislature to make a void proceeding valid. It can no more impart a binding efficacy to a void proceeding that it can take one man's property from him and give it to another; indeed, to do the one is to accomplish the other.

McDannil v. Correll, 68 Am. Dec., 589.

Pryor v. Downey, 50 Cal., 405.

22. "The Legislature may cure, retrospectively, irregularities and imperfections in tax proceedings, *but it cannot infuse life into an utterly void proceeding,* or take the property of one person and transfer it to another. Denny v. McCown, 34 Or. 47, 54 Pac. 952; Teralta Land Co. v. Shaffer, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595."

Ferguson v. Kaboth, 43 Or., 421; 73 Pac., 201.

And the plaintiffs in error, relying on the following points which they make on this appeal, show that the foregoing citations of authorities are applicable thereto:

1. Minnie Evvia Stadelman and Henry Hines Fletcher, two of the plaintiffs in error, were the heirs of Charles W. Fletcher, deceased, and the citation complained of in this case was directed to them. They were non-residents of the State of Oregon, and received no actual notice of the death of their said ancestor or of the proceedings for the administration of his estate and the sale of the property which had descended to them immediately upon his death.

See Citations Nos. 6, 9, and 10.

2. The citation directed to said heirs did not mention any term of court therein—was not made returnable at a regular term of the county court. (The county court is always open for the transaction of ordinary probate business, but when the proceeding or transaction requires the presence of or notice to another, then it must be at a regular term of the county court. See Sec. 947, L. O. L.)

See Citations Nos. 11 (particularly) and 13 to 17, inc.

3. The said citation was first published June 17, 1902. The earliest date for appearance that could have been lawfully fixed therein was, therefore, July

25, 1902. It cited the heirs to appear July 16, 1902, or one day after the service thereof, instead of ten days thereafter, as required by statute.

See Citations Nos. 11 and 12 (particularly) and 13 to 17, inc.

4. The published citation did not indicate that the copy from which it was taken bore the seal of the clerk of the court.

See Citations Nos. 18 and 19 (particularly) and 13 to 17, inc.

And to assure the Court that it has jurisdiction, and that it should exercise it on behalf of these plaintiffs in error, we call attention to the following matters:

1. The time allowed the non-resident heirs to appear and oppose the application of the administrator for the order of sale (1 day, or, at most, 2 days) was unreasonably short.

2. The Supreme Court of Oregon, even in its decision in this case, admits that this citation was irregular, and was not a compliance with the requirements of the statute. (See p. 43, Transcript of

Record, beginning 10th line from bottom of page; and p. 44 thereof, last sentence on page.)

3. Said Minnie Evvia Stadelman and Henry Hines Fletcher, relying on the Oregon statutes and the construction that had been consistently placed thereon from the time of their enactment, sold a half interest in this property to John W. Motley, the other plaintiff in error; and said Motley in reliance on said same statutes and decisions contracted therefor and purchased the same. (See court's finding No. 15, p. 21, Transcript of Record.)

4. There is no precedent for the decision of the Oregon Supreme Court in this case. It is out of sympathy with all former Oregon decisions involving the question as to whether provisions of the statute prescribing the contents and substance of process and summons are mandatory or are directory. Beginning with the case of *Hunsaker v. Coffin*, 2 Or., 110, the Oregon court has heretofore consistently held that the provisions of such statutes are mandatory, and that unless the summons or process correctly contains the substance of the matter specified

in the statute authorizing it the court acquires no jurisdiction by the service thereof and can render no valid order, judgment, or decree. To this effect, see:

Hunsaker v. Coffin, 2 Or., 110.
Heatherly v. Hadley, 4 Or., 14.
White v. Johnson, 27 Or., 393.
Smith v. Whiting, 55 Or., 393.
Northcut v. Lemery, 8 Or., 316.
Brown v. Coleman, 62 Or., 455.
Marks v. Wilson, 143 Pac., 907 (Ore.).
Osburn v. Maata, 135 Pac., 166 (Ore.).

5. This is not a case involving the construction of a statute or constitutional provision of the Oregon laws or constitution. It is admitted that the statute prescribing the form and contents of the citation was not complied with by the administrator and the probate court. The question is: *What was the effect of this failure to comply with the statute?* In other words: *What was the effect of the failure to make the citation returnable at a named term of court?* And the further question: *What was the effect of the failure to give the heirs ten days after service of*

the citation within which to appear? And of giving them but one day instead of the ten prescribed by the statute?

6. Let the court also bear in mind the fact that these plaintiffs in error have relied upon, and urged, from the very beginning of this suit, the constitutional right and protection that they are here asking this court to recognize and uphold. (See certificate of Hon. Chief Justice McBride, pp. 56-7, Transcript of Record; and Assignment of Error numbered VII, which stands unchallenged in this Court.)

7. To recapitulate, for emphasis and clarity:

(a) The citation complained of did not comply with the requirements of the statute authorizing the issuance thereof and prescribing its form and contents, in this, to-wit: It did not mention any term of court—was not made returnable to a term of court; and did not give the heirs cited 10 days within which to appear, but gave them 1 day instead of the 10 days prescribed by the statute.

(b) All this is admitted by the Oregon Supreme

Court in its final decision; and is patent upon the face of the record.

(c) All prior decisions of the Oregon court held those and similar statutory provisions relative to summons and process mandatory, and a compliance therewith necessary to the jurisdiction of the court.

(d) The Oregon court now says, in its decision in this case, in substance and effect, that the notice by citation provided for by the statute is not necessary to the jurisdiction of the court, but that any notice, in any form whatsoever, that would inform the heirs when and where they were required to appear, is sufficient, and that notwithstanding that it requires non-resident heirs to appear within 2 days after service of the notice upon them. (See last paragraph of decision.)

(e) The heirs in this case, Minnie Evvia Stadelman and Henry Hines Fletcher, in reliance upon the wording of the statute and the hitherto unbroken line of decisions in Oregon, and in reliance upon the protection promised them by the Federal Con-

stitution, contracted with reference to said property and sold an interest therein; and John W. Motley, the other plaintiff in error herein, also relying upon the Oregon statutes and the effect hitherto given them by the Oregon Supreme Court, and in confidence that the constitutional rights of the said heirs would not be denied and invaded, contracted with said heirs with respect to said real property, purchasing a half interest therein

(f) And in their efforts to free their property of the cloud cast upon the title by the pretended administrator's sale thereof, said plaintiffs in error have urged said Federal question, and are now asking this Court to give them the benefit of its protection, just as all citizens are declared, by the Constitution, to be entitled thereto.

ARGUMENT.

Upon the death of Charles W. Fletcher, his property under the laws of the State of Oregon, descended immediately to, and vested in, his heirs. They were

the owners, subject only to the right of the administrator to the temporary possession thereof, and subject to the right of the Probate Court, by the mode prescribed by statute, to sell the same and apply the proceeds derived from the sale to the payment of the claims against the estate and the expense of administration.

The statutes of the State of Oregon provided the only means by which the said title of those heirs could be divested. Among other things it was required by statute that the heirs be cited to appear and show cause why their property should not be sold. The law (Sec. 1254, L. O. L., No. 11, Points and Authorities) required that the citation should issue to those heirs to appear at a term of Court THEREIN MENTIONED, *not less than ten days after the service of such citation.* Under Section 1175, B. & C. Comp. (See Points and Authorities, No. 11), it is required that such citation shall be served and returned as a summons; and upon an heir or devisee, unknown or non-resident, it may be served by publication in a newspaper, *not less than four weeks*, or for such further time as the court or judge

may prescribe. As stated by Mr. Justice Moore of the Supreme Court of the State of Oregon, in one of the opinions handed down in the case at bar (See paragraph numbered "1", p. 33, Transcript of Record): "The four weeks and ten days thus limited means thirty-eight days to be computed by excluding the first day of publication of the citation, and including the day upon which the order of sale of the land is made. O'Hara vs. Parker, 27 Or. 156, 39 Pac. 1004; Horn vs. U. S. Mining Co., 47 Or. 124, 81 Pac. 1009." In other words, the four weeks of publication means twenty-eight days, at the end of which twenty-eight days the service is deemed to be complete, just as though the heir or devisee to be served had been, on such twenty-eighth day, served personally with the citation. He should then have ten days thereafter within which to appear and show cause why his property should not be ordered sold.

This is not a case where the Supreme Court of the State of Oregon construed a statute of the state and held that such statute had been complied with. It is admitted by the Court that the statute was not complied with. The citation published and addressed

to the heirs of Charles W. Fletcher, deceased (See pp. 29-30, Transcript of Record), as shown by the affidavit of publication (See p. 29, Transcript of Record), was first published on the 17th day of June, 1902. The service thereof by publication was not, therefore, complete until the 15th day of July, 1902. The citation notified and required the heirs to appear at the court house in Coquille City, Coos County, Oregon, on the 16th day of July, 1902, or one day after the service thereof by publication (had the same been a valid citation) would have been complete.

In view of the showing made by the record as indicated by the foregoing paragraphs of this argument, we respectfully submit to the Court that it has jurisdiction upon two grounds: First, the Supreme Court of the State of Oregon admits that the statute was not complied with; and, secondly, the time allotted the heir residing outside of the State of Oregon within which to appear was made unreasonably short by the terms of the citation.

It is even a matter of grave doubt in our minds if the statute itself as construed by the decisions of the Supreme Court of the State of Oregon, as indi-

cated by the foregoing quotation from Justice Moore's decision, is not violative of the due process of law provision of the Constitution. When we consider the fact that this service is not deemed by the Court to have been made until twenty-eight days shall have elapsed from the first publication thereof, and consider the further fact that this is intended as a service upon a non-resident of the state in whatever land he may then be, we are impressed with the conviction that ten days is an unreasonably short time within which to require him to appear and oppose the application for the order of sale. Certainly no reasonable person could argue or contend that the one, or at most, two, days allotted by the citation or pretended citation involved in the instant case, was a reasonable time to be given the heirs of Charles W. Fletcher, residents as they were of the State of Missouri, within which to appear and show cause why their property should not be ordered sold by the Court.

But it being admitted by the Court of the State of Oregon (and being unmistakably apparent upon the face of the record) that the citation issued to the heirs of Charles W. Fletcher, deceased, was not a compliance with the requirements of Section 1254,

L. O. L., the Court saying in its decision (See last lines page 44, Transcript of Record), "though the citation was irregular in the respects mentioned," and the citation upon its face showing that it omits to mention a term of Court therein, and fails to give to the heirs the required ten days within which to appear, we respectfully submit that it is incumbent upon this Court in maintenance of the stability of the law, in applying the ordinary and almost universal rules applicable to the construction of statutes relating to the service of process on absent parties, to hold that this attempt at securing jurisdiction of the persons of the heirs of Charles W. Fletcher, deceased, did not constitute due process of law—was not a compliance with the established modes of judicial procedure in the State of Oregon. We contend that it is manifest upon the face of the record, that the so-called "citation" was no citation at all, and that the abbreviated publication did not constitute service of anything.

We have now brought to the attention of this Court the fact that under the laws of the State of Oregon the real property of Charles W. Fletcher descended to these plaintiffs in error immediately upon

his death. It was their own individual property and under the protection and immunity guaranteed to them by the Constitution of the United States they could not be deprived thereof except by due process of law. Due process of law has been defined by Lord Coke to be synonymous with "the law of the land," but by other authorities, including Justice McBride, the venerable Chief Justice of the Supreme Court of the State of Oregon in the first decision handed down by the Supreme Court of said state in the case at bar, "due process of law" is defined, in effect, to mean the established modes of judicial procedure in the jurisdiction in which it is sought to be invoked. Now, it is too well settled to admit of any question that proceedings for the sale of real property by an administrator are purely statutory. Indeed, such a thing was unknown and impossible at common law. The Supreme Court of the State of Oregon has held, directly, that in the sale of real property of a decedent for the payment of debts and in serving interested non-resident parties with notice by publication, the County Court acts under a special statutory authority not according to the common law. (See *Smith v. Whiting*, 106 Pac., 791; *Wright v. Edwards*, 10 Or., 298.) It is "hornbook law" that

where a court, however general or superior its jurisdiction, is exercising a special power conferred upon it by statute, it must, strictly, comply with the requirements of such statute or its judgment or decree will be void—a nullity. This rule has been directly announced by the Supreme Court of the State of Oregon (*Northcutt v. Lemery*, 8 Or., 322-3; *Smith v. Whiting, supra*), and it is not saying too much to declare that this rule is practically universal throughout the civilized world wherever governments have adopted written codes of civil procedure. Certainly is it true in this country, where the people by their Constitution have guaranteed to the individual reasonable security in his person and property rights.

Does the citation involved in this suit comply strictly with the express requirements of the statute? Does it mention any term of court? *It does not.* Does it cite the heirs to appear not less than ten days after the service thereof? *It does not.* Does it by virtue of any seal of office noted thereon bear evidence that it was issued out of any court by due and proper authority? *It does not.* The said published citation contains neither of said essentials, each and all of which are made absolutely necessary to a valid cita-

tion by said Sections 1254 and 1368 of Lord's Oregon Laws.

The plaintiffs in error do not necessarily contend that if this citation as published had shown upon its face that it had been issued by the Clerk of the Court with his seal of office thereunto affixed, and had by its terms given the heirs the statutory period of time within which to appear (38 days from the date of the first publication, or, more accurately speaking, 10 days after the 28 days of publication were completed) and the court, through mistake or arbitrarily, had made the order after such proper formal citation had been fully served by the four weeks' publication required by statute but before the 10 days allowed the heirs within which to appear had expired—these plaintiffs in error, do not contend, we say, that such an order so prematurely made after complete service of a valid writ, would have been void; but we do respectfully contend that the court should distinguish between the premature entry of a judgment after complete service of valid process and the entry of judgment by a court against persons who had not been served with any valid process but who had been served, we will say, with an unsealed document

which did not comply with the mandatory requirements prescribing the form and contents of a valid citation.

In other words, as so clearly stated by Mr. Justice Burnett of the Supreme Court of Oregon in his dissenting opinion (See p. 46, Transcript of Record):

> "This is not a question of serving a valid process upon the defendants therein and taking a decree prior to the expiration of the period of service. It is a question of publishing that which is not process because it does not comply with the requirements of the statute defining the citation and prescribing what it shall contain."

And for a clear exposition of the law of Oregon with reference to the mandatory requirements relative to the form and contents of a citation, and for a convincing argument in behalf of these plaintiffs in error on the question before this Court, we respectfully recommend a careful reading and consideration of the brief, logical, and unanswerable dissenting opinion rendered by Mr. Justice Burnett when the case at bar was before the Supreme Court of the State of Oregon. (See pp. 45-46, Transcript of Record.)

ested to appear at a time and place to be specified, *not less than 6* nor more than 10 weeks from the time of making the order, to show cause why authority should not be given to sell, etc. It is apparent that since the first day of March was exactly 5 weeks after the 25th day of January (the time of making the order) the date fixed for the appearance, *viz.*, March 2, was six days too early to be a compliance with the minimum term fixed in the statute. The court there in commenting upon that fact made the following statement:

> "The order was returnable nearly a week less than the time provided for, and, therefore, was not in accordance with the statute. It went to the foundation of the entire proceeding and showed a want of jurisdiction on its face which was fatal to its validity. The rule is quite well settled that in a proceeding to divest title to real estate the statute must be strictly pursued; any substantial departure from its requirements renders the proceeding void. The defect was not merely an irregularity, but one of a jurisdictional character."

The case of Bibson v. Roll, *supra*, likewise involved the question of the validity of an administrator's sale. The only question before the court in that case

was the sufficiency of the administrator's notice (corresponding to the citation in Oregon) to justify the order of sale made by the court. It appears that in that state (Illinois) a certificate of publication is taken and considered in connection with the notice. The notice recited that the administrator would make application on the 3rd day of September for a decree. The petition was dated July 24 and the certificate showed that the first publication was made on the 24th day of July. In that state at that time the statute required he notice to be published for three successive weeks, the first publication to be at least six weeks before the presenting of the petition. Now, the Court will notice that the 3rd day of September (the day fixed in the notice) was just one day short of the term of six weeks required by that statute. Note, if you please, what the Supreme Court of the State of Illinois had to say relative to the sufficiency of that notice, or citation:

> "The statute requires the notice to be published for three successive weeks, the first publication to be at least six weeks before the presenting of the petition. Here there was less than six weeks between the 24th day of July, when the notice was first published, and the 3rd

> day of September, when all persons interested were notified that the petition would be presented; and had the petition been presented on that day, *there is no doubt that the notice would have been insufficient.* But the record shows that the petition was actually presented on the ninth day of September, when the six weeks had expired. Was, then, this notice sufficient to authorize the court to receive the petition on the 9th day of September, and to act upon it? Were parties interested bound to appear at all under a notice which showed on its face that they were notified so to do at a time when the law imposed no obligation upon them to appear? We are inclined to think that the notice was void upon its face."

The facts in that Illinois case were the facts of this Oregon case, except that they are exaggerated to the point of caricature. There the court went infinitely further than this Court is requested to go to hold the administrator's sale void in this case. In that case the time fixed by the citation was only *one* day too short. In the case at bar the time fixed by the citation for the appearance of the heirs was *nine* days too short. In the Illinois case the statutory time for appearance had elapsed five days before the order was actually made on the petition. In this Oregon case the order of sale was actually made eight days

before the statutory time for the appearance of the heirs had expired. But in both cases was involved the principle emphasized by the question propounded by the Illinois Supreme Court in its decision: "Were

> parties interested bound to appear at all under a notice which showed on its face that they were notified so to do at a time when the law imposed no obligation upon them to appear?"

The Supreme Court of the State of Illinois answered that question in the negative. The Supreme Court of the State of New York, as hereinbefore shown, answered the same question in the negative. And we respectfully submit to this Court that the Supreme Court of the State of Oregon, early in the judicial history of the state, to-wit: in the case of Hunsaker v. Coffin, *supra,* not only answered the same question in the negative, but said with reference to process in that case involving the identical principle under discussion here: "Service of such a writ would have

> no binding force upon the defendant, or compel him to appear and answer, any more than would the service of so much blank paper."

And right now, lest the Court be misled by an

unforunate statement contained in paragraph numbered "(2, 3)" of the decision of the Oregon Supreme Court in this case (See p. 35, Transcript of Record) we call attention to the fact that L. O. L. No. 59, therein referred to, has no application to service of citation by publication, but applies exclusively to civil actions between parties and to the publication of summons therein. The statutes of Oregon contain no such provision applicable to service of a citation in an estate matter. And we confidently assert that, assuming that the ten days' service on non-resident heirs is not so unreasonably short as to make the statute unconstitutional, an administrator's sale, if conducted regularly and in accordance with the statute, is absolutely binding upon the heirs, so that they could not get it set aside except they could show fraud to which the purchaser at the sale was a party. The nature of the proceeding repels the possibility of such probationary statute.

The Supreme Court of Washington in the case of BIG BEND LAND COMPANY, Respondent, v. R. E. HUSTON, *et al*., Appellants, the decision being handed down by Justice Webster on October 30, 1917, all of

the other eight justices concurring therein, discusses a defective summons as follows:

"Section 818, Rem. Code, provides:

" 'The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him.'

"In the summons served upon the defendants, the nature of the action is not stated, the relief demanded is not mentioned, and no return day is designated. This is a special statutory proceeding, summary in its nature, and in derogation of the common law. It is an elementary rule of universal application in actions of this character, that the statute conferring jurisdiction must be strictly pursued, and if the method of procedure prescribed by it is not strictly observed, jurisdiction will fail to attach and the proceeding will be a nullity. *Smith v. Seattle Camp No. 69, W. O. W.*, 57 Wash. 556, 107 Pac. 372. The original summons is in neither strict nor substantial compliance with the statute and is clearly void.

"The question therefore arises, may a plaintiff in an unlawful detainer action file a complaint, have no summons issued thereon—for a void summons is equivalent to no summons—obtain a writ

> of restitution, and have it executed by putting the tenant out of possession of the leased premises, and subsequently and while himself in possession, serve a summons upon the tenant and thereby confer jurisdiction on the court to hear and determine the controversy?"

It will be noted that the Washington Supreme Court, in this latest case to be found on the subject, treated every requirement of the statute prescribing the form of the summons as mandatory.

We feel that it is not necessary to urge upon this Court that the question before it for solution is one involving the application of a constitutional provision and that this Court is not interested in, and should not have its attention diverted by, alleged inequities between the parties to the suit; but in anticipation of an argument that seemed to find favor and consideration in the Supreme Court of the State of Oregon, and in support of our contention that the rights of innocent non-resident heirs are just as sacred as those of persons who, though it be through ignorance, purchase at a void judicial sale, we beg leave to quote at length from an opinion rendered by a learned justice of the Mississippi Supreme Court

in the case of *Root vs. McFerrin,* 37 Miss., 17; 75 Am. Dec., 57:

"The great reason why judgments should be regarded as thus conclusive is, that there may be an end of litigation. *Sit finis ad litem.* Public policy demands submission to judgments that have ben fairly invoked, fully considered, and finally pronounced; but neither justice, public policy, nor the organic law of the state will sanction the denial of the right to be heard by himself or counsel, or both, of any citizen. The constitution declares that political power is inherent in the people; that free governments are founded on their authority, and established for their benefit; that even for crimes no man shall be deprived of life, liberty, or property but by due course of law, and justice and right shall be administered without sale, denial, or delay; that no person shall be debarred from prosecuting or defending his cause before any tribunal in the state. In violation of these rights and prohibitions designed to protect the liberty and property of the citizen, the courts established 'for his benefit' and to administer 'right and justice without sale, denial, or delay,' can pronounce no valid judgment. The opportunity to avail himself of these rights is as essential as the rights themselves, and inseparably incident to them; and hence this doctrine of 'notice' is applicable alike to all tribunals and all judgments under our system. It cannot be tolerated that the doors of justice should be closed against a party who has never heard that his rights were in dispute in the courts, or had an opportunity to defend them. The whole

policy and practice of our courts, under the principles of the organic law to which we have just referred, reprobate and condemn such a doctrine. The most liberal policy is extended to the citizen, whether plaintiff or defendant, by our laws. Forms are abolished in pleading, amendments allowed, new trials granted, bills of review, appeals, and writs of error provided for, and courts of equity with all their remedial powers, established, that right and justice may be administered without denial.

"These rules and principles are mandatory to all the departments of government, and to none more beneficially for the protection of private rights than to the judicial department.

"The hardship of these cases upon purchasers at administrator's sales, and the disquietude in such titles so frequently occurring, are ugred upon us as reasons for reviewing the rule heretofore established. Rightly considered, there is no greater hardship or disquietude resulting from the disregard of the act of the legislature under which these sales are made than from the disobedience and disregard of other laws, human and divine, resulting in loss of property.

"If men, with all the means of information which the law has wisely afforded, will not take the trouble to examine the validity of titles which they seek to acquire, but trust to the good faith as well as legal knowledge of administrators, or to the competency and integrity of the officers

appointed by law, and will neither examine the records for themselves nor procure competent legal advice, always at hand, to know what they do, they should not expect courts to relieve them of the consequences of their own folly. It is simply a question betwen them and the heirs, often children, neither cognizant of their rights nor responsible for the errors and omissions complained of. Which shall lose the title? Upon whom shall the penalty fall? Upon the disobedient adult, or the passive, ignorant minor?

"We think the rule is wise, just, well settled; and if disquietude results from its observance, it will generally fall on those who in all ages have warred against the law, the neglecters and violators of its wise and humane precepts."

We are deeply conscious of a patriotic duty to urge upon the Court to uphold with unusual firmness and peculiar resolution, at this political crisis in our nation's history, this most important of all American institutions. This, the paramount provision in our national Constitution, should now, of all times, be religiously observed and exactly applied and enforced.

As was said by the court in the case of *Davidson v. New Orleans*, 96 U. S., 97, 102: "When the great barons of England wrung from King John

> at the point of the sword the concession that neither their lives nor their property should be disposed of by the Crown except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament, of which the barons were a controlling element."

As applied to the Fourteenth Amendment to our Constitution, the term "due process of law," by a parity of reasoning, refers to that law of the land in each state which has been duly enacted pursuant to powers exerted in the interests of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and is, in this country, secure because of the fact that the people hold and retain the right to make and alter at their pleasure the rules of conduct by which they are to be governed. And so we urge that when the sovereign people of Oregon, or of any other state, have enacted into law a mode of procedure by which it is decreed that a court may obtain jurisdiction over the person of the individual, the court cannot, without the consent of that individual, obtain such jurisdiction except by a subtsantial com-

pliance with the mode pointed out in the statute. In Oregon the law is well settled that the probate court can make no valid order for the sale of property by an administrator without first obtaining jurisdiction over the persons of the heirs of the deceased. This should be kept in mind to the end that the rule to be applied in Oregon be not confused with that obtaining in some other jurisdictions, where the statutes have modified the ancient rules governing the descent of property and the statutes and decisions of the courts have converted the proceeding for the sale of property by an administrator into a proceeding *in rem*. In Oregon the proceeding for the sale of land by an administrator is a proceeding *in personam*. It is made so by statute. Section 1254, L. O. L., requires the issuance of the citation to the heirs and devisees; Section 1255 provides the method of its service upon the heirs; Section 1256 refers to "the hearing" to be held before the order of sale is made by the court; and what other proceeding can be referred to in Section 947 as not "authorized to be had or done without the presence of or notice to another"? All these statutes have been in force, substantially in their present form, since 1862; and as early as the case of

Fiske v. Kellog, decided when the state was in her infancy, the necessity for notice to the heir was recognized and proclaimed by the court.

In view of the wording of the Oregon statutes, particularly when considered with the construction that has been consistently placed upon them by her courts, we do not apprehend that this Court will give serious consideration to any contention that "due process of law" in Oregon, as applied to an administrator's sale of real property which has vested in an heir by virtue of his ancestor's death, does not mean that such heir shall be duly served with a citation substantially in the form prescribed by Section 1254, L. O. L. Such citation, therefore, must notify the heir that he is cited to appear at a *term of court*, and must NAME that term of court, and the time of appearance, at least (Justice Burnett construes the statute to mean the term of court mentioned), must, by that citation, be fixed so that it is NOT LESS THAN TEN DAYS AFTER THE SERVICE THEREOF. This is the "due process of law" which has been guaranteed to that heir by the Constitution; and the moment that the courts of Oregon, or of any other state, cease to

guard with jealous care this most important right which the people of this entire nation have reserved to every citzen thereof, that moment have they proven unfaithful to one of the most sacred principles upon which this great government was founded; they are denying to such heir a right which they hold in trust for him but which was secured to him together with all of his fellow citizens at a cost which cannot be measured in terms of silver and gold, and for the maintenance of which said right precious American blood is now being shed on European battlefields.

In our examination of the decisions of the various courts of our land involving this particular question we have been gratified to find that the courts, generally speaking, have not been unfaithful to the trust so lodged in them, but have guarded with the utmost good faith this constitutional right of every citizen to notice that his rights to property are being contested. If the notice is to be constructive, it must, in order to clothe the court with jurisdiction, be published or served strictly in accordance with the manner prescribed by the statute. The court, in other words, might protect the citizen against the legisla-

tive department by saying, "THIS STATUTE IS NOT DESIGNED TO GIVE THE CITIZEN A REASONABLE OPPORTUNITY TO LEARN THAT HIS PROPERTY RIGHTS ARE BEING CONTESTED"; but when the Legislature has prescribed a certain method of carrying notice to the citizen, no court has authority to curtail that notice or to say: "WE ADMIT THAT THE HEIRS WERE NOT SERVED IN THE MANNER PRESCRIBED IN THE STATUTE; WE ADMIT THAT THE CITATION WAS IRREGULAR IN THAT THE HEIRS WERE NOT CITED TO APPEAR AT ANY MENTIONED TERM OF COURT, AND THAT IT DID NOT GIVE THEM AS MUCH TIME WITHIN WHICH TO APPEAR AS THE LEGISLATIVE DEPARTMENT SAID THEY SHOULD HAVE; BUT WE DEEM THE NOTICE AS GIVEN SUFFICIENT. IF THEY SAW THIS NOTICE THEY OUGHT TO HAVE KNOWN THAT IT WAS INTENDED TO BE WHAT IT OUGHT TO HAVE BEEN; AND IF THEY DID NOT SEE IT THEY ARE JUST AS WELL OFF AS THEY WOULD HAVE BEEN HAD THE NOTICE BEEN THAT REQUIRED BY THE STATUTE." That, we maintain, was the identical attitude,

without any exaggeration, assumed by the Supreme Court of Oregon in this case; and that it is an attitude which excites just indignation in the breast of the citizen, shakes his confidence in our courts, and undermines his love, and finally his respect, for all our national institutions. Such usurpation, by the courts, of the office and exclusive province of the legislative department of government is certainly destined to result in confusion.

As an illustration of what we deem the proper attitude of the courts where they are requested thus to infringe upon the governmental functions of the legislative department, we call attention to the California case of *Nellis v. Justice's Court of Los Angeles* Township, 129 Pac., 473-4, where the court holds that a substantial compliance with the statutory provisions prescribing the form and contents of the summons is indispensible, and that, without such compliance, the court does not acquire jurisdiction to render a default judgment. And the court in that case properly disregards the argument that the informality in the process did not, in any degree, impair the efficacy of the notice in that particular case.

Nor would we be understood to say that the Oregon Supreme Court has hitherto been negligent in exacting a substantial compliance with the provisions of such statutes where the matter has been called directly to its attention. Indeed, its prior record on this question is such as to indicate that the unhappy pronouncement of the court in this case may be traceable to some omission or failure of duty on the part of counsel for the plaintiffs. And in proof of the statement that the Oregon court has kept faith with the citizen in this regard we have but to call attention to the case of *Osborn v. Maata,* 135 Pac., 166, decided September 23, 1913, where the court, speaking through Mr. Justice Bean, used the following expressive language:

> "Where the statute prescribes certain things which the published summons shall contain, such specifications must be deemed essential and necessary, and the absence of any of them is not a compliance with the requirements of the statute and is fatal to the jurisdiction. Citing Odell v. Campbell, 9 Or. 296-304; McMinn v. Whelan, 27 Cal. 300."

And this decision last mentioned is but the echo of an oft-repeated doctrine of the Oregon Supreme Court

which has long since ripened into a fixed rule of property besides being a simple reiteration of the most common rule by the announcement of which the courts of the land assert their fidelity to the Fourteenth Amendment to the Constitution. The plaintiffs in error, having contracted among themselves in confidence that this fixed rule of property would be maintained, and in confidence that the Probate Court of Coos County, Oregon, had exceeded its jurisdiction when it had sought to deprive the Fletcher heirs of their property without a compliance with the statutes relative to proceedings for the sale of real property by administrators and in violation of this oft-repeated canon of procedure in Oregon, are now appealing to this Court to overcome and repel what appears to be an unwarranted invasion of their constitutional rights. It is important that this Court should hear their prayer and grant it. No man should be deprived of his property even though it be, in fact, in satisfaction of a just debt except that property be taken from him by due and orderly procedure in accordance with the laws applicable thereto enacted by the legislative department of the government. He should be given every opportunity afforded

to him by the then existing statutes to receive notice that his rights to the property have been challenged to the end that he may contest the other's claim. To us the contentions of the defendants in error appear so monstrous, so utterly execrable, that it is difficult for us to conceive that they may be espoused by thoughtful and patriotic American citizens. As that this administrator's sale should be permitted to stand, it is just as reasonable to say that a creditor could acquire title to his debtor's horse by the simple and direct method of appropriating the animal during the absence of the owner.

But important and sacred as are the rights of the plaintiffs in this suit the appeal thereof is entitled to hardly so much weight as is the consideration to be given the effect that this Oregon decision might have upon the future judicial decisions of the state. How many citizens might unjustly suffer thereby and be deprived of their constitutional heritage in the lower courts of the state before the Supreme Court might grasp an opportunity to justly smite and destroy it?

As there are other matters that are the proper sub-

ject for the consideration of the Oregon Supreme Court in the event that the writ of error is finally sustained in this Court, we respectfully ask that the case be remanded thereto with a decision herein favorable to the plaintiffs in error.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 644

MINNIE EVVIA STADELMAN,
HENRY HINES FLETCHER,
and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon.

BRIEF OF DEFENDANTS IN ERROR.

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BRIEF OF DEFENDANTS IN ERROR.

The parties will be referred to in this brief as plaintiffs and defendants, the plaintiffs below being plaintiffs in error in this court.

The object of this suit was to secure the decree of the court adjudging void an administrator's sale of real estate.

The land in question was formerly owned by Charles W. Fletcher. He died intestate in Coos

County, Oregon, January 27, 1897. Thereafter John F. Hall was duly appointed administrator of his estate by the County Court of Coos County, and on April 14, 1907, letters of administration were duly issued to him. Mr. Hall continued to act as such administrator down to his discharge as such on May 20, 1904.

At this time the court duly made its order, approving his final accounting and discharging him from all further liability as administrator. It is undisputed that all of the proceedings connected with this final accounting were regular and lawful, and that the final decree is binding upon the whole world. On the 6th day of June, 1902, the administrator filed his petition, praying for a sale of the real estate involved in this action. On the 17th day of July the County Court made its order authorizing the administrator to sell the real estate in question.

It is undisputed that the proceedings upon which this order was based were in all respects regular, except that ten days did not intervene between the time when the service of the citation was complete and the day set for the hearing, and except that the citation did not in terms specify that it was returnable at a term of court. The court ordered the cita-

tion to be served upon the unknown heirs by publication in a newspaper for four weeks. This publication was made in conformity with the order, the fourth publication being July 8th, 1902, which was only nine days before the day set for the rehearing. If the service was not complete until the end of the fourth week, i. e., July 15th, then there were only two intervening days instead of ten. It is undisputed that it was necessary to sell this land for the payment of debts and expenses of administration, and that the land was sold for its full value at the time and was purchased by August Nelson, who bought in entire good faith. It is also undisputed that the proceeds of this land were used for the payment of debts and expenses of administration. The final accounting of the administrator shows the fact that there remained in the hands of the administrator to be disbursed the sum of only $26.66.

The plaintiffs, Minnie Evvia Stadelman and Henry Hines Fletcher are the two children of Charles W. Fletcher and claim this land as his heirs. The plaintiff, John W. Motley, claims an undivided half interest in this land as grantee of the other two plaintiffs. The defendants trace their title from the purchaser, August Nelson, at the administrator's sale, and their title depends upon the validity

of the administrator's deed.

The court found that the defendants had succeeded to the right of dower of Maggie Fletcher, the widow of the decedent. It is undisputed that during the time August Nelson and his successive grantees owned this property, they paid the taxes thereon for each of the years, commencing with 1903, and including the year 1911, with the exception of the year 1907, during which the land was not assessed for taxation.

The Circuit Court held the administrator's deed void and rendered a decree establishing the title in the plaintiffs, subject to the widow's dower right and the re-payment to the defendants of the purchase price paid for the land at the administrator's sale, with interest, and also the re-payment of the taxes paid, with interest. The court further ordered a sale of the premises, that the proceeds might be applied according to the respective rights of the parties, as fixed by the decree. On appeal the Supreme Court of Oregon reversed this decree and ordered the suit dismissed. Final judgment of dismissal was entered the 20th of April, 1917. (Printed Transcript, 36-37.)

The statutes relating to the service of the citation in such cases are the following: Section 1254

L. O. L.:

> "Upon the filing of the petition a citation shall issue to the devisees and heirs therein mentioned, and to all others unknown, if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for."

Section 1255 L. O. L. provides:

> "Upon an heir or devisee, known and resident within this state, such citation shall be served and returned as a summons; and upon an heir or devisee unknown or non-resident, it may be served by publication in a newspaper published in the county chosen by the administrator or executor not less than four weeks, or for such further time as the court or judge may prescribe."

The two heirs of the decedent, plaintiffs in error, resided without the State of Oregon at the time these proceedings were instituted, and their residence was unknown to the administrator at that time and continuously up to and a short time before the commencement of this suit. The finding of the trial court on this subject is as follows:

That at the time of the death of said Charles W. Fletcher, and at all times thereafter up to shortly before the commencement of this suit, the place of residence and whereabouts of the plaintiffs, Minnie Evvia Stadelman and Henry Hines Fletcher was unknown to John H. Hall, the administrator of said estate and was unknown to him at the time of the filing of the petition for sale of the real property, and the publication of the citation aforesaid. (Printed Transcript, 20.)

For the purpose of the argument we will assume that the federal question argued was properly raised at the proper time.

In so far as the record presents a case of statutory construction, no federal question is involved. The Supreme Court of Oregon has held that the requirement with respect to ten days' elapsing between the service of the citation and the day fixed for the hearing is merely **directory** and not jurisdictional. The same doctrine was laid down by that court as to the failure of the citation to specify that the term when it was returnable was in fact a regular term of court. (Printed Transcript, 31 to 46.) That it was a regular term is undisputed, and the trial court so found. (Printed Transcript, 20.)

The decision of the Supreme Court of Oregon must be accepted as final by this court so far as it construes these Oregon statutes relating to the service of the citation.

The only question presented by this writ of error is whether the statutes of Oregon **as so construed** authorized the taking of the property of the heirs without due process of law. The doctrine that the mere construction of a state statute presents no federal question is elementary and sustained by a long line of decisions of this court.

In Castillo vs. McConnico, 168 U. S. 674, the court said:

> "The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Admendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or

change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, **what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states.** When, then, a state court decides that a particular formality was or **was not essential** under the state statute, such decision presents no federal question, providing always the statute **as thus construed** does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. Pittsburg, Cincinnati, C. & St. L. Railway Company vs. Backus, 154 U. S. 421, (38:1032); Kentucky Railroad Tax Cases, 115 U. S. 322 (29:414); Davidson vs. New Orleans, 96 U. S. 97 (24:616).

"Bearing the foregoing elementary principle in mind, we will briefly notice the adjudicated cases upon which the plaintiff in error relies.

"The authorities referred to tending to establish that where the law requires assessment to contain the name, the omission of the name renders the assessments void, we are inappropriate to the question under consideration. We are not here concerned with the meaning of the Louisiana statutes, or whether we would hold as an original proposition, were we construing them, that a defect in the name of the person assessed would not be a material variance. The Supreme Court of the State of Louisiana has construed the statutes of that state otherwise. The issue which we are to determine is not what interpretation should be given to the statutes of the State of Louisiana, but whether, accepting the meaning affixed to the statutes of that state by the court of last resort of the state, their provisions as so interpreted are repugnant to the Constitution of the United States, because not affording due process of law."

See also French vs. Taylor, 199 U. S. 274; Lombard vs. West Chicago Park Comrs., 181 U. S. 33-43-44.

The question then to be determined in this case is this: Has the property of the heirs been taken without due process of law, because the heirs were

not given the full ten days' time between the service of the citation and the day set for hearing, and because the citation did not **in so many words** declare that it was returnable at a term of court. The question answers itself.

When the owner of real estate dies, the right to inherit such property is a **privilege** created by statute law. No person has any constitutional right to inherit the property of another upon his death. Whatever right he secured is through the indulgence of the sovereign power. It is upon this ground that the courts have upheld the exercise of the taxing power as applied to the taxation of property which passes by inheritance upon the death of the former owner. What is taxed in such cases is the privilege of succeeding to the decedent's property—a privilege which the law-making power may wholly take away.

37 Cyc. 1553 and cases cited.

Upon the death of the owner of property it passes under the control of the proper probate court. After the administration has been granted, all of the estate of the decedent is within the control of such court. While in many states the real estate of the decedent cannot be sold by the administrator to pay debts without an order of the Probate Court,

based upon notice to the heirs, it is universally recognized that such notice is not at all necessary. It is within the power of the Legislature to authorize the administrator upon an ex parte application to the court to obtain an order authorizing him to sell real estate to pay debts. In other words, the Legislature may wholly dispense with notice to the heirs.

Indeed it is undoubtedly competent for the Leglature to treat the real estate of the decedent the same as his personal property, and to authorize the administrator, without any order of court, to dispose of the real estate, subject to his accountability to the heirs for an abuse of his trust.

In Walking vs. Holman, 16 Peters 25, this court said, at pag 62:

> "And no doubt can be entertained that the Legislature may authorize the administrator by a general or a special act to sell lands to pay debts when the personal assets are exhausted without any application to the court."

A proceeding to sell the real estate of an heir is not a proceeding to take away his property from him, but merely a proceeding to change the form of that property from real to personal. The proceeds of the sale are in the hands of the administrator, and he is fully accountable to the heirs for the

faithful application of these proceeds, as they should be applied under the law; and his bond is there to protect the heirs. If the proceeds are applied to the payment of debts, the heir has been in no manner injured, and if they have not been so applied he has the right to hold the administrator accountable for the moneys.

Under every system of jurisprudence, the real estate of a decedent descends to the heirs burdened with the decedent's debts. This is the law in Oregon. Sec. 4348 L. O. L. declares that the real estate descends to the persons named, "subject to his debts."

Other sections make heirs liable for debts of the decedent under certain circumstances. Secs. 491, 495 and 496, L. O. L.

The proceedings relating to the sale do not bind the heirs with respect to the existence of debts or with regard to the proper application of the proceeds of the sale by the administrator. These matters are all open to litigation upon the final accounting by the administrator. Under all the authorities the proceeding relating to final accounting is a proceeding in rem and binds all parties interested, provided the statutory steps are taken.

The only time these heirs can be prejudiced by

an erroneous decision of the Probate Court would be upon the final accounting when the proper application of such proceeds by the administrator would be open to full investigation; and it stands unquestioned under the law that the proceedings in that respect have been had and the heirs fully bound. But it would not change the case if no final accounting had been had, for in that event the heirs would still be fully protected in their right to compel the administrator to make proper application of the proceeds of the sale.

The authorities are unanimous on this point that the state has full power to authorize the sale of a decedent's real estate without any notice whatever to his heirs.

Furth vs. U. S. Mort. & Trust Co., 42 Pac. 523.
Cooley Const. Lim. (6th Ed.) 121-122.
Wilkinson vs. Leland, 2 Peters 659.
Mohr vs. Porter, 8 N. W. 344-371 to 373.
In re Smith estate, 41 At. 542.
Irwin vs. Guthrie, 47 At. 992.
George vs. Watson, 19 Tex. 369-370.
Mitchell vs. Campbell, 19 Or. 198.
Grignor vs. Astor, 2 How. 319-339.
Watkins vs. Holman, 16 Peters 26-61 to 63.
Williamson vs. Williamson, 41 Am. Dec. 638.

Ackerson vs. Orchard, 35 Pac. 605.

Brenhann vs. Story, 39 Cal. 197.

Foster vs. Foster, 129 Mass. 564.

Louisville etc., L. Co., vs. Jordan, 16 L. R. A. 251-256.

Based upon the universally recognized doctrine that an heir has no constitutional right to a notice in proceedings to sell the real estate of his decedent for payment of debts, this court has twice held valid a curative statute curing administrators' sales of real estate utterly void for want of jurisdiction.

The Court in Wilkinson vs. Leland, 2 Peters 657, has sustained a statute legalizing an absolutely void deed given by an executrix of a will appointed in New Hampshire with respect to land in the State of Rhode Island. It was conceded that the New Hampshire court had no authority to authorize the execution of the deed to the land in Rhode Island, and that the same was absolutely void. Nevertheless, the court sustained the legislation legalizing the deed. In this case, the court, referring to the sale by the executrix, said:

> "The sale, therefore, made by the executrix to Moses Brown and Oziel Wilkinson, in virtue of the said license, was utterly void; and the deed given thereupon was proprio vigore, in-

operative to pay any title of the testator to any lands described therein."

The court further recognized the principle that it was not competent for the Legislature of Rhode Island to divest a person of his property rights, and said: (In other words the court treated the question precisely as it would have treated it had the 14th Amendment been in force at that time.)

"We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."

The court then said:

"The question then arises, whether the Act of 1792 involves any such exercise of power. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens which have

been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested interest; and it confers no title except to what remains after every such lien is discharged. In the present case, the devisee under the will of Jonathan Jencks without doubt took a vested estate in fee in the lands in Rhode Island. But it was an estate still subject to all the qualifications and liens which the laws of that state annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover to establish the fact that the estate so vested has been divested; but that it has been divested in a manner inconsistent with the principles of law.

"By the laws of Rhode Island, as, indeed, by the laws of the other New England states (for the same general system prevades them on this subject), the real estate of testators and inestates stands chargeable with the payment of their debts upon a deficiency of assets of personal estate. The deficiency being once ascertained in the Probate Court, a license is granted by the proper judicial tribunal, upon the petition of the executor or administrator, to sell so much of the real estate as may be necessary

to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island the license to sell is granted, as matter of course, without notice to the heirs or devisees, upon the mere production of proof from the Probate Court of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may enter and recover the possession of the estate, notwithstanding any intermediate descents, sales, disseisins, or other transfers of title or seisin. If, therefore, the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operations of law, divested and superceded; and so, pro tanto, in case of a partial sale.

"But it is said that this is a retrospective Act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not devest the set-

tled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith (for it is not attempted to be impeached by fraud); and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the Legislature was satisfied that the sale was bona fide, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the Legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that in a state not having a written constitution, acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed as a general principle by courts of justice. The present case is not so strong in its circumstances as that of Calder vs. Bull (3 Dall. Rep. 386), or Rice vs. Parkham (16 Mass. Rep. 226); in both of which

the resolves of the Legislature were held to be constitutional."

In Watkins vs. Holman, 16 Peters, 25, the court sustained an act of the Legislature confirming an administrator's deed for land in Alabama sold by the administrator under order of the court of Massachusetts. Referring to this deed, the court said at page 27:

> "That this deed is inoperative is clear. It was executed by the administratrix under a decree or order of the Supreme Court of Massachusetts, and by virtue of a statute of that state. The proceeding, it is not pretended, was authorized by any law of Alabama. And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated.
>
> "By the laws of Alabama, she had no power to dispose of the real estate of her husband, as administratrix, except for the payment of the debts of the estate, under the sanction of the law."

It was contended that the act of confirmation was void as being in violation of the constitutional rights of the heirs. In overruling the objection, the

court said, at page 61:

"The character of the act in question is essentially remedial. It contains no other feature. An authority is given to the administratrix to sell, in a particular manner, the property in dispute, for the payments of the debts of the intestate. The act does not determine the amount of the debts, nor to whom they are payable. It is proved, however, that the estate was insolvent. And it is conformably to the settled policy of Alabama, to apply the real estate of a deceased person in the payments of his debts. The case under consideration, the administratrix residing in Massachusetts, and being desirous of selling the property through her attorneys in fact, was not embraced by the general statute on the subject and hence the necessity of the special authority.

"Now, how does this act differ in principle from the general law on the same subject? The general law was passed from the knowledge which the Legislature had of its expediency and necessity. The special law was passed from a knowledge of its propriety in the particular case. The power exercised in passing the special as well as the general law, was remedial.

"Under the general law, application is required to be made by the executor or administrator to the County Court, representing that the personal estate is not sufficient to pay the debts of the deceased; that he left real estate, particularly describing it, and praying that it may be sold, etc. A notice is required to be given to the heirs and devisees, etc., who are to answer, etc., and the court on the hearing are authorized to decree a sale of the estate on the petitioner's giving bond, etc.

"The mode of procedure under the general law was required by the Legislature, from motives of expediency; but it by no means follows that it was the only mode they could adopt. In some of the states, the heirs or devisees are not required to be made parties by the administrator. His application is ex-parte to the court, which orders a sale of the real estate to pay the debts of the deceased, where the personal estate is insufficient. And no doubt can be entertained that the Legislature may authorize the administrator, by a general or a special act, to sell lands to pay debts, where the personal assets are exhausted, without any application to the court. And in such case the admin-

istrator would act on his own responsibility, and be accountable to the creditors and heirs for the correct performance of his trust, as in other parts of his duty." The court further said:

"As a legal proposition, it is wholly unsustainable.

"In the first place it is contrary to the general practice of many of the state, and to the received notions of the profession on the subject. Titles in Ohio and in many other states, to a vast amount of real property, rest upon sales of executors and administrators under the order of a court, without making the heirs parties; and it is believed that doubt of the validity of such titles, where the proceedings have been regular, has never been entertained or expressed. These titles have been contested in state courts and in this court; and a defect of power to convey a good title in the mode authorized, it is believed, has never been objected.

"A course of proceedings so extensive, involving interests so great, and which has been subject to the severest legal scrutiny, is no unsatisfactory evidence of what the law is.

"But, on principle, this proceeding is sustainable. On the death of the ancestor, the

land owned by him descends to his heirs. But how do they hold it. They hold it subject to the payments of the debts of the ancestors, in those states where it is liable to such debts.

"The heirs cannot alien the land to the prejudice of the creditors. In fact and in law they have no right to the real estate of their ancestors, except that of possession, until the credits shall be paid.

"As it regards the question of power in the Legislature, no objection is perceived to their subjecting the lands of the deceased to the payments of his debts, to the exclusion of his personal property. The Legislature regulates descents, and the conveyance of real estate. To define the rights of debtor and creditor is their common duty. The whole range of remedies lies within their province."

Mohr vs. Porter, 8 N. W. 363-371 to 373.

In this case the court said:

"I do not understand that the notice to the heirs at law, or other parties interested, is absolutely necessary to give jurisdiction to the Probate Court, and this court has not so decided. It has decided that because the statute has required notice to be given, it must be given or

there is no jurisdiction to examine the rights of those entitled to such notice under the statute. It would follow, as a matter of course, if there were any constitutional or other objection to conferring power upon the Probate Court to order the sale of lands of a deceased person or ward for the payment of debts, or for the other purposes mentioned in the statute, without first giving notice to those supposed to have an interest in the matter, then the section above quoted could not cure such defect; not because it was not intended to cure it, but because the Legislature had no power to cure it. If, on the other hand, the Legislature, if it saw fit, could confer upon the Probate Courts the power to sell the lands of wards or inestates to pay debts, or for other purposes mentioned therein, without giving notice to those interested, then it would have the power to declare that the failure to give a notice which it had directed should not render the sale void, and that the giving such notice should be considered directory only, and the want of it not fatal to the proceedings. That the Legislature has the power to give Probate Courts the right to authorize the sale of real estate of deceased persons, or of wards

under guardianship, to pay debts, or for their support, or to make the estate more profitable by changing it from real to personl estate, without giving any notice to the heirs at law or devisees of a deceased person, or to those supposed to be interested in the estate of a ward, is well established by the authorities.

"This question is discussed by Mr. Cooley in his work on Constitutional Limitations, and he cites a great many cases showing that the Legislature may, by an act of legislation, authorize the sale of the estates of deceased persons to pay debts, and of wards to pay debts, or for their better support, without the action of any court upon the subject, and without any notice given to parties interested that any application to the Legislature for such authorization will be made. The courts have held uniformily that such legislation is not an assumption of judicial functions. It goes no further than changing the property from real to personal, without directing how the property shall be applied after it is so converted. Such legislation does not adjudicate that any debts are due and owing which should be paid out of the converted property when the sale is ordered to pay debts.

It proceeds upon the assumption that there are debts owing which should be paid from the proceeds of the sale, but leaves the adjustment and payment of the same to the executor, administrator, or guardian; and, where there are any disputes as to the amount due, such disputes are settled by the courts. * * * * *

"That the Legislature could authorize the sale of the lands of minors or insane persons to pay debts, or for their support, without notice to anyone, is perfectly clear from the nature of the case. In the absence of any statutory provision declaring that certain persons should be considered interested in such proceedings, no one would have any interest in the estates of such wards as would entitle them to any notice of a proceeding to sell them. And in such cases, the statute having declared that certain persons shall be deemed to have an interest in such proceedings, and be entitled to notice, their right depends entirely on the statute; and as, without it, they would have no right to a notice or hearing on such proceeding, it is therefore perfectly competent for the Legislature to say that such proceeding shall not be held void in any collateral proceeding, although such parties

had no notice of the proceeding, as required." To same effect Mitchell vs. Campbell, 19 Or. 198-209-210; O'Keefe vs. Behrens, 85 Pac. 555.

In Brenham vs. Story, 39 Cal. 179, the court said at page 185:

> "The right of an heir to his inheritance depends upon positive law, and is not a natural or an absolute right. It is competent for the Legislature to change the rule of inheritance, or to restrict the testamentary power. It may provide, as it has done, that the heir or devisee shall take subject to certain burdens, as the payment of the debts of the deceased, and the right of the court to appropriate some portion of the estate for the support of the family of the decedent during the administration.
>
> "It is undoubtedly within the scope of legislative authority, to direct that the debts be paid from the reality instead of the personal property; or, as is done in some states, that the heir need not be made a party to the proceeding to obtain a sale of real estate, or that the administrator may sell without any order of the court whatever. But all these acts must be for the satisfaction of these liens, which are held to be paramount to the claim of the heirs or de-

visees."

The due process clause of the 14th Amendment was never intended to limit the power of each state in dealing in its own way with the title to and the disposition of real estate of a decedent for the payment of his debts. Such a clause was already in existence in some form in all of the state constitutions; and yet it was never regarded as impairing the legislative power to deal with a free hand with the whole question as to the succession to real property on the death of the owner and with respect to what proceedings should be had to make such real estate available for the payment of debts. All that the 14th Amendment has accomplished has been to make the question a federal as well as a purely state question. **The inherent nature of the question has not been changed.**

Many courts have held that where an administrator has been lawfully appointed, the court secures jurisdiction over the estate of the deceased, including his real property, and that defects in the notice to the heirs, or even a total want of notice is a mere irregularity, for which the sale cannot be collaterally attacked.

When we consider the true nature of probate proceedings, it is obvious that the court obtains jur-

isdiction of all the estate of the decedent, real and personal, when the administrator has been duly appointed and has qualified. From that point on the proceedings are essentially proceedings in rem. The court in the administration of the estate is not seeking to render a personal judgment against anyone, but to administer the property within its jurisdiction, pay creditors and distribute the surplus money to those entitled to it by law. From the beginning to the end of such proceedings no personal notice of any kind is absolutely required by any principle of constitutional law. The court may base its proceedings and orders upon service by publication or any other kind of constructive service. A proceeding in these probate proceedings instituted by an administrator to sell real estate to pay debts is not a new and independent proceeding, but an integral part of the probate proceedings, in which he has been already appointed. It, therefore, follows that a failure on his part to give the exact statutory notice of his application for the order to sell is an irregularity merely.

In Good vs. Norley, 28 Ia. 188, Chief Justice Dillon says at pages 208-210:

> "The following cases relating to administrators' sales, and that, too, under statutes pro-

viding that notice of the application should be given in terms as strong as in our statute, if not stronger, hold that the proceeding is **in rem**; that the provision as to notice is **directory**; and that, if not given, it does not deprive the court of jurisdiction; and hence, an order for a sale, without such notice, or upon notice alone to the guardian, while irregular, and reversible on appeal, is not void, when collaterally attacked.

"Grignon's Lessee vs. Astor, 2 How. (U. S.) 319, 1844, leading case; following and approving McPherson vs. Cunliff, 11 Serg. and Rawle, 422, 1824; Salstonstall vs. Riley, 28 Ala. 164, 1856; Wilkinson vs. Leland, 2 Pet. 627 (arguendo, per story, J.); Sheldon vs. Newton, 3 Ohio St. 494, 1854, reviewing previous Ohio decisions; Benson vs. Cilly, 8 id. 604, 1858; Howard vs. Moore, 2 Mich. 226; Coon vs. Fry, 6 id, 506, 1859; Doe vs. Harvey, 5 Blackf. 487; Thompson vs. Doe, 8 id. 336; Norton vs. Norton, 5 Cush. 524, others to the same effect might be cited. Contra, that notice is jurisdictional, Babbitt vs. Doe, 4 Ind. 346, 1853; Doe vs. Anderson, 5 id. 33, 1854; Doe vs. Bowen, 8 id. 197; Gibbs vs. Shaw, 17 Wis. 197; French vs. Hoyt, 6 N. H. 370, 1833; and others holding the same view

may doubtless be found.

"In the case now before the court there was no fraud practiced on the infant heir. She was only two years of age, and notice of any kind to her would have been a useless ceremony for any purpose, since she could not have understood it, and since her own mother was a party to the proceeding, was represented by counsel, and is not shown to have been in any way adversely concerned to her child. The sale was ordered after appearance and consent by the mother and natural guardian, and after a guardian ad litem had been appointed to act for the heir. The plaintiff paid full value, received a deed from the administrator, which was approved by the court, and has been in continuous adverse possession of the property ever since 1852. The property meanwhile has doubtless greatly enhanced in value, and it will defeat the reasonable and just expectations of the plaintiff should he lose it at this distant day.

"On no principle of justice has the heir, under such circumstances, a right which, in strength and persuasiveness, will at all compare with the right of the purchaser. Every fair mind will thus regard the relative claims of

these two parties to this land. This would be so everywhere. **But particularly ought this to be so in a new country, which, like ours, is rapidly developing, and where, as a rule, lands are rapidly augmenting its value.** Voorhies vs. Bank, 10 Pet. 449; Shawhan vs. Loffer, 24 Iowa. Sound public policy is concerned in giving stability to titles acquired in good faith at administrator's sales. Unless such titles enjoy public and professional confidence, lands which it is necessary to sell to pay the debts of the inestate will bring very inadequate prices. This would result in the manifest injury to heirs in general. Unless such sales, when made in good faith by the administrator and under the order of the court, can be upheld, all the manifold evils of doubtful ownership will the result."

In Ackerson vs. Orchard, 35 Pac. 605, the court said:

"It is true, the law then provided, in relation to sales of real estate, that a petition should first be presented to obtain an order therefor, and a citation issued thereon, notifying parties interested to appear at the time set for the hearing. But could not the Legislature have dispensed with this petition? It seems to us

unquestionably the Legislature had such power, as the court acquired jurisdiction of the estate by the appointment and qualification of the administrator, and, the administration of an estate being a proceeding in rem, the Legislature could have provided for a sale of the lands without any petition or notice whatever. If this is true, the Legislature could thereafter pass the statute in question, validating sales where no petition had been filed, when the particular things therein specified appear. It is therefore immaterial whether this petition in question, and the citation to appear at the hearing thereon, were void in consequence of the failure to give the prescribed notice, or for any reason. The respondents' title can safely rest on the subsequent proceedings and the curative act aforesaid, under the conceded facts in the case."

Said the court in Mitchell vs. Campbell, 19 Or. 198, 209:

"But where a court obtains jurisdiction over a special subject matter given to it by law, **as Probate Courts do over the estates of deceased persons after an executor or administrator of the estate has been duly appointed and qualified,** and the court has proceeded to exercise its

jurisdiction in regard to a matter connected therewith without having complied with the mode which the Legislature has prescribed, **but which it could have dispensed with, then, the proceeding of the court, although irregular and defective, could be confirmed by subsequent legislation when justice would thereby be promoted.''**

Not a single decision can be found in the whole range of American jurisprudence holding that a state may not upon the death of the owner of real property, authorize proceedings for the sale of such real property to pay debts without any notice whatever to the heirs.

In the state of Oregon where this land is situated the Supreme Court in Mitchell vs. Campbell, 19 Or. 198, held, and the decision has never been overruled, that the right of the heir to notice in proceedings for the sale of the decedent's real estate was purely a matter of legislative grace and that proceedings utterly void for want of such notice could be validated by a curative statute, and such has been the holding of this court in the cases already cited.

It is proper for the court to consider the facts as found by the trial court relating to the proceedings subsequent to the making of the order authorizing

the sale. This order was not made until the day after the return day, to-wit, on July 17, 1902, and the sale was not actually made until January 20, 1903, and was not approved until February 3, 1903. (Printed Trans., pp. 20-21.)

During all this period of time, which was long after the service upon the heirs by publication had been completed, no injury had been done the heirs by the premature making of the order, as the County Court would on motion have set aside the premature order and allowed the heirs to be heard on the question whether a sale was necessary; and it is perfectly obvious, as said by the Supreme Court of Oregon, that the heirs were not prejudiced by the premature making of the order, for the simple reason that they knew nothing of the proceedings at all. Said the court:

> "In such case, if the party intended to be served by publication of the process had no knowledge thereof, he could not have appeared at the time and place designated; and, this being so, the premature rendition of the judgment could not have seriously prejudiced him."

It is too clear to justify further argument that the state may declare, through its legislative or judicial branch, that the proceedings

shall not be void when the only defect in the notice is that it sets the hearing a day or two before the time prescribed in the statute and omits to state in so many words that the hearing is to be had at a regular term although the return day is in fact in term time. The Legislature could have expressly declared that these requirements of the statute were directory only. This is precisely what the Supreme Court of the state has done. For the court to hold that the 14th Amendment has been violated by this decision is to take away the power of every state court to decide what provisions of a statute relating to jurisdiction are merely directory notwithstanding the fact that the Legislature might have declared in so many words that such provisions should be regarded as merely directory or might have even dispensed with such requirements altogether.

The contention that the constitutional right of the plaintiffs in error were violated because the citation had no seal affixed to it is a pure afterthought. No such claim is made in the plaintiffs' complaint. The only two grounds therein relied upon in claiming that the citation was void were the grounds already discussed. (Printed Trans., p. 4.)

The court expressly found that the citation was

duly issued as prescribed by law. (Printed Trans., p. 19.)

No reference to this point can be found in the opinions of the Supreme Court of Oregon and there is nothing upon this record to show that the citation did not in fact have the seal affixed to it. On the contrary, the printed citation contains at the end the words, "County Court's Seal." Furthermore, whether the absence of the seal would render the process void is purely a question for the state courts, and on this point the authorities are in conflict. But it is too obvious for argument that no citizen has the right to invoke the 14th amendment on the ground that a state law requiring the court's seal to be affixed to the process was not observed.

The judgment should be affirmed.

GUY C. H. CORLISS,

Attorney for Defendants in Error.

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MAR 12 1918
SUPREME COURT U.S.

PETITION FOR REHEARING

(26,311)

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 644.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

In Error to the Supreme Court of the State of Oregon

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MERCHANTS PRESS, SPOKANE

(26,111)

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 644.

MINNIE EVVIA STADELMAN, HENRY HINES FLETCHER and JOHN W. MOTLEY,
Plaintiffs in Error,

vs.

W. H. MINER and CHARLES WORDEN,
Defendants in Error.

PETITION FOR REHEARING

The Honorable Court having dismissed the above-entitled appeal for want of jurisdiction upon the authority of four cited cases and without com-

ment, an examination of these cases becomes necessary to determine upon what ground this action is taken by the Court. The one point common to all of the four cases cited by the Court appears to be that the Supreme Court of the United States is without jurisdiction where the record before it fails to show that the Constitutional question was raised in the state court prior to the petition for the writ of error or in the assignment of errors.

Plaintiffs in error respectfully petition the Court for a rehearing, and urge the following

ASSIGNMENT OF ERROR:

1. The Court erred in dismissing the appeal, or writ of error upon the grounds indicated by the decisions cited.

ARGUMENT

Extended argument is unnecessary. The fact is that the Constitutional question was raised by the plaintiffs in this suit from the very commencement thereof and was relied upon by them. In justice,

therefore, they are entitled to have the question passed upon by the Supreme Court of the United States. But does the transcript of record submitted disclose the fact that plaintiffs relied upon the provisions of the Fourteenth Amendment to the Constitution? To the writer, unfamiliar with any technical rules that may have been adopted by the Court, it seems that nothing stated in either of the decisions cited indicates that the question should be answered in the negative, and we can see no reason why an affirmative answer should not be given. We make the following points:

1. The record shows that on the 21st day of June, 1917, there was served upon the attorney for the defendants in error written assignments of error, subdivision numbered VII of which expressly states that Section 1 of Article XIV of the Amendments to the Constitution of the United States had been raised at the presentation and trial of the suit and had been quoted in the brief of plaintiffs filed in the Supreme Court of the State of Oregon. (See pp. 51 and 52 Transcript.) Although served as above recited this statement was never challenged by or on behalf of the defendants in error.

2. On pages 56-7 of the printed transcript of record is set forth a copy of a certificate made by Chief Justice McBride of the Supreme Court of Oregon which states, in no uncertain language, the fact that this constitutional question was presented for the consideration of the Oregon Court; that the said provisions of the Federal Constitution were relied upon by plaintiffs, and that their claim based thereon was considered by the Oregon Supreme Court and decided by that court against said plaintiffs.

3. We also direct attention to the fact that the first opinion rendered by the Supreme Court of Oregon and reported in Volume 83 of the Oregon Reports at pages 351-378 was inadvertently omitted from the transcript of record in violation of subdivision 2 of Rule 8 of the Rules of this Court; and that said opinion (see 83 Or. 364-372) discusses said Constitutional provision as applicable to this case, showing that it was, from the very first, under consideration by the Oregon Supreme Court.

If the Court cannot consider the point last above raised while the record is in its present condition we take this occasion to suggest a diminution of

the record and respectfully ask that the Clerk of the Oregon Supreme Court be directed to certify up a copy of the said opinion, which appears to have been omitted from the record as sent up. We respectfully urge this in the interest of justice and agreeable to the evident spirit of the stipulation of the parties as indicated by paragraphs numbered 10 and 11 thereof (Transcript, pp. 1 and 2).

We hereby certify that the foregoing petition is made in good faith in the belief that the plaintiffs in error are entitled to have the case considered upon its merits; and we respectfully submit the same to the attention and consideration of the Honorable Court without any request or desire for oral argument thereon on behalf of the plaintiffs in error.

Respectfully submitted,

HARRY G. HOY,

JOHN M. GEARIN,

Attorneys for Plaintiffs in Error.

CERTIFICATE OF COUNSEL

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in point of law; and I further certify that the same is not interposed for delay.

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Attorneys for Plaintiffs in Error.